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25 I.A. 47

FILED

FEB 3 1975

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

Walter F. Zimmerman
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

THE PEOPLE OF THE STATE OF ILLINOIS,))	
	)	Appeal from the Circuit Court of
Plaintiff-Appellant, )	)	Montgomery County.
vs.))	
)	
DENNIS DALZOTTO, )	)	Honorable Paul M. Hickman,
	)	Presiding Judge.
Defendant-Appellee.))	

Mr. JUSTICE G. MORAN delivered the opinion of the court:

The State appeals from an order of the circuit court of Montgomery County suppressing evidence that the defendant, Dennis Dalzotto, was unlawfully in possession of a controlled substance on October 15, 1973 in the City of Hillsboro, Illinois.

On the evening of October 15, 1973, Dalzotto was riding in a car with Eric B., Joan C., and Jan A., near Hillsboro. Eric B., who was driving the car, committed a traffic violation for which he was stopped by Officer Dave White of the Hillsboro police force. Officer White directed that the car should be driven to the police station in Hillsboro. Upon arriving at the station, all in the car went inside the station. Dalzotto, Joan C., and Jan A., returned outside. Dalzotto and Joan C. drove Jan A. to her home. Dalzotto and Joan C. went back to the police station where they were met by Joan C.'s sister, Jama C.

Dalzotto, Joan and Jama then leaned against or sat upon a police car that was parked in front of the station. Dalzotto sat on the right front fender over the headlight of the car. Officer White emerged from the police station and asked Dalzotto to go inside. After Dalzotto entered the station, he was found to be in possession of a drug capsule containing Secobarbital which is a controlled substance.

Dalzotto was subsequently indicted for the unlawful possession of a controlled substance in contravention of Illinois Revised Statutes, ch. 56-1/2, par. 1402(b). He filed a motion with the circuit court of Montgomery County to suppress the evidence against him on the grounds that the capsule was taken from him pursuant to an unreasonable search and seizure, in violation of his rights under the Fourth Amendment to the United States Constitution, and Article I, Section 6 of the 1970 Illinois Constitution.



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CHICAGO BAR ASSOCIATION

741

At the hearing on the motion to suppress Officer White testified that he had asked Dalzotto to enter the police station because a Hillsboro city fireman had informed him that he had seen Dalzotto place his hands through an open window in the police car on which Dalzotto was sitting. Officer White said that there were papers, a camera, a walkie-talkie, and possibly keys in the police car, and that he had been concerned that Dalzotto might have removed some of these items from the car. White testified that after Dalzotto had entered the station, he asked Dalzotto what he had in his pockets, and that in response to that question Dalzotto immediately began to empty his pockets and to throw the contents on the desk. According to Officer White, Dalzotto thereby happened to deposit three drug capsules on the desk, two of which he grabbed and swallowed. White said that he and another officer took the third capsule away from Dalzotto before he could place it in his mouth. It was that capsule which was the basis of the indictment against Dalzotto.

Dalzotto testified simply that after he had entered the police station upon Officer White's request, he was searched; that he had not been arrested prior to the search; and that he had not consented to the search. He also said that no one had asked him to get off the police car before Officer White asked him to go into the station. To rebut Officer White's testimony in part, Dalzotto called Jama C. and Joan C. as witnesses. Both testified that they had been with Dalzotto during the entire time that he was in front of the police station, that Dalzotto had remained seated on the police car, and that he had never reached inside the car.

After the trial court had heard the evidence and studied the briefs, he entered the following order:

"The Court having fully considered the arguments and briefs on the Motion to Suppress and being fully advised in the premises, finds that Defendant was not under arrest at the time of the seizure of the material in question, that he did not give his consent to any search or seizure, that no search warrant had been issued or served upon the Defendant and that no probable cause was shown for such search and seizure and based upon such findings concludes that the search and seizure was illegal and any evidence obtained thereby should be and is hereby suppressed."

The parties make several contentions in this appeal but we need consider only whether the trial court's finding that there was no probable cause for the search of defendant's person was justified. The evidence on this issue was in conflict. The defendant and two witnesses testified that defendant had never reached inside the car.

This means that no one could have observed Dalzotto reaching into the car, and leads to the inference that no one would have told Officer White that he had seen such an incident. But Officer White testified to the contrary that a city fireman had said that he had seen Dalzotto reaching into the car. The fireman did not testify. A question of credibility therefore arose which was for the circuit court's resolution. The circuit court's conclusion based on this conflicting evidence was not clearly unreasonable and its conclusion should be sustained. The People v. Peterson, 17 Ill.2d 513; The People v. Haskell, 41 Ill.2d 25.

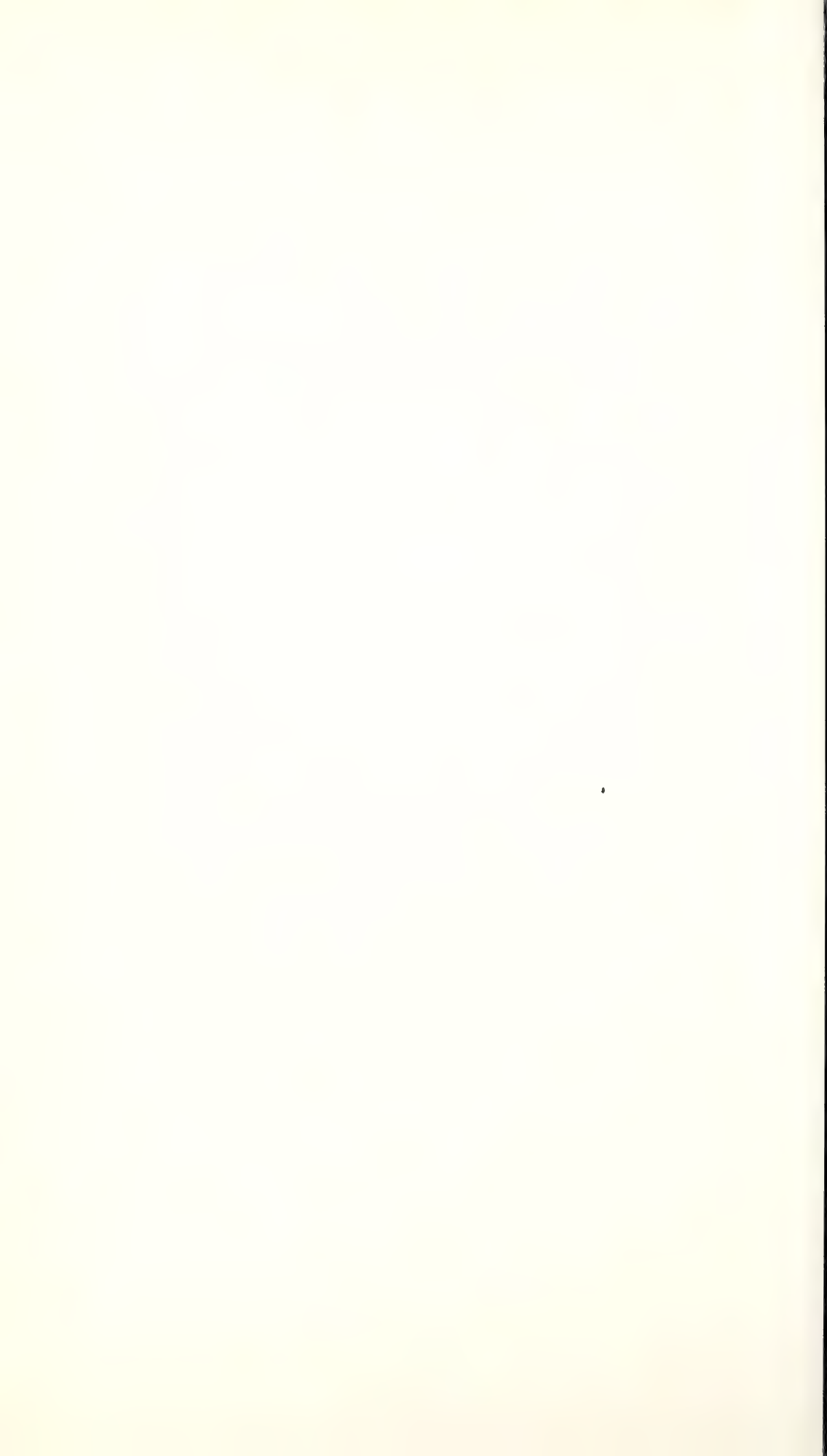
For the foregoing reasons, the judgment of the circuit court of Montgomery County is affirmed.

Judgment affirmed.

CONCUR: .

Carter, Crebs, JJ.

PUBLISH ABSTRACT ONLY



3D
25 I.A. 64

72-352

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Justice
Honorable WILLIAM L. GUILD, Justice
Honorable L.L. RECHENMACHER, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:
On January 31, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

Abuse

FILED

1972

1972

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) Appeal from the
) Circuit Court of
v.) the 19th Judicial
) Circuit, Lake
HAROLD KELLY,) County, Illinois.
)
Defendant-Appellant.)

MR. PRESIDING JUSTICE THOMAS J. MORAN delivered the opinion of the court:

At arraignment on August 11, 1972, the defendant pled guilty to driving while his license was suspended (Ill. Rev. Stat. 1971, ch. 95-1/2, §6-303), and to driving under the influence of intoxicating liquor (Ill. Rev. Stat. 1971, ch. 95-1/2, §11-501). He received concurrent jail sentences of 90 days for each conviction and was placed on a work release program. The defendant appeals contending that (1) he was not adequately and fully apprised of the consequences of his pleas of guilty and that this, together with the fact that he was not represented by counsel, resulted in his being denied due process of law; and (2) the trial court erred in not conducting a hearing in aggravation and mitigation.

The proceedings below were not reported and the defendant has not furnished a bystanders' report of proceedings or a stipulation of facts. (Ill. Rev. Stat. 1971, ch. 110A, §323(c), (d).)

The State, however, has moved this court to accept a bystanders' report that was served on the defendant on August 3, 1973, more than 9 months after defendant's notice of appeal was filed (October 30, 1972). The motion was ordered taken with the case. There is no contradiction between the common law record and the bystanders' report and the common law record is sufficient to determine the issues raised. Therefore, we find it unnecessary to rule upon the State's motion except to note that "The responsibility for the proper preservation of the record of the proceedings*** rests upon the defendant." Supreme Court Rule 323(c) makes "adequate provision for the reconstruction of the proceedings at trial" and Supreme Court Rule 329 allows the record on appeal to be amended to correct material omissions, inaccuracies or improper authentication so that the record accurately discloses what occurred at trial. People v. Kasdictus, 51 Ill. 2d 72 (1972).

The common law record for August 11, 1972, contains the following docket entries as to each offense:

(Case #72T28573: driving while license suspended.)

"Def. pleads guilty - Def. explained conseq. of plea and right to Atty. Def. persists in plea of guilty - Def. explained again right to atty and Jury trial. Def. persists in plea of guilty. Def. sentenced under work release.

Defendant Harold Kelly in open Court without counsel - People in open Court by Jack Hoogasian, State's Atty. by Peter Pates Asst. State's Atty. - Defendant advised of his rights to trial by Jury and his rights to have an Attorney represent him - Defendant also advised that he may be sentenced to jail - Defendant enters a plea of guilty to said charge - Defendant again advised of his rights to Jury Trial and his rights to have an Atty. Defendant persists in his plea of guilty - Defendant's plea accepted by the Court. Defendant sentenced to 90 (Ninety) days in Lake County Jail - to run concurrently with 72 T 28574 - Defendant remanded - Defendant waives his rights to have a Jury Trial and to his rights to have an Atty. - Defendant put on Work Release Program."

(Case #72T28574: driving while under the influence of intoxicating liquor.)

" Lv. to Amend Compl. on face. Def. Pleads Guilty- Conseq. of Plea explained - Right to Jury trial and Atty. Def. persists in plea & waives Jury trial and Atty. knowingly and voluntarily. Plea accepted. Def. sentenced under work release.

Defendant Harold Kelly in open court without counsel- People in open Court by Jack Hoogasian, State's Atty. by Peter Pates Asst. State's Atty. - Defendant advised of his rights to trial by Jury and his rights to have an Attorney represent him - Defendant also advised that he may be sentenced to jail - Defendant enters a plea of guilty to said charge - Defendant again advised of his rights to Jury trial and his rights to have an Atty. Defendant persists in his plea of guilty - Defendant sentenced to 90 (Ninety) days in Lake County Jail - to run concurrently with 72 T 28573 - Defendant remanded. Defendant waived his rights to have a jury trial and to his rights to have an Atty. Defendant put on Work Release Program. "

Where the accused faces imprisonment as a result of his plea of guilty, the record must demonstrate that the trial court used the utmost solicitude to insure that the defendant fully understood the connotations and consequences of his plea. When the trial court properly discharges such function, it leaves a record adequate for appellate review. (Boykin v. Alabama, 395 U.S. 238, 23 L. Ed. 2d 274, 280, 89 S. Ct. 1709 (1969). See also Ill. Rev. Stat. 1971, ch. 38, §113-4(c).) The record must affirmatively disclose that a defendant who pled guilty entered his plea understandingly and voluntarily. (People v. Arndt, 49 Ill. 2d 530, 534 (1971).) If the defendant is not represented by counsel and where the prospect of imprisonment exists, the record must further reveal that the defendant's right to counsel was knowingly and intelligently waived, Argersinger v. Hamlin, 407 U.S. 25, 32 L. Ed. 2d 530, 538-39, 92 S. Ct. 2006 (1972).

As already ascertained, we review this case from the common law record which "imports verity and is presumed to be correct unless contradicted by other facts in the record." (People v. Lyons, 19 Ill. App. 3d 294, 295 (1974).) The common law record herein stands uncontradicted by other facts in the record.

The record recites that the defendant was explained the consequences of each of his pleas of guilty, that he was advised of the possibility of a jail sentence under each charge, that twice under each charge he was informed of his right to counsel and his right to a jury trial, that he knowingly and voluntarily waived these rights, and that thereafter his persistent pleas of guilty were accepted. Such recitals affirmatively demonstrate that the trial court fully discharged its duty to advise the defendant of the consequences of his plea and of his right to be represented by counsel, and disclose that the defendant knowingly waived his right to counsel. In finding no merit to defendant's first contention, it is appropriate to quote from People v. Arndt, supra, pp. 533-34:

"(I)n dealing with***Boykin it must be borne in mind that the court was apparently there considering a truly 'silent record,' with no admonition whatsoever to, or examination of, the defendant. The Supreme Court itself has not interpreted the Boykin case in the literal way in which the defendant reads it. Rather, that court has said: 'The new element added in Boykin was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily.' Brady v. United States (1970), 397 U.S. 742, 747-8, n. 4, 25 L. Ed. 2d 747, 756, 90 S. Ct. 1463."

The defendant next maintains that, unless waived, a hearing in aggravation and mitigation was mandatory prior to sentencing; that he did not waive this right and that the trial court therefore erred in not conducting a hearing prior to sentencing.

Section 1-7(g) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, §1-7(g),) in force at the time defendant was sentenced, required that a hearing in aggravation and mitigation be conducted. It was, however, incumbent upon the defendant to request such hearing and failure to do so constituted a waiver of the requirement. (People v. Nelson, 41 Ill. 2d 364, 367 (1968); People v. McNeil, 52 Ill. 2d 409,

417 (1972).) Defendant does not claim nor does the record indicate that he requested a hearing in aggravation and mitigation. We find, therefore, that defendant's right to such hearing was waived.

For the reasons stated, the judgments are affirmed.

Judgments affirmed.

GUILD and RECHENMACHER, J.J. - concur

3D
25 I.A. 78

73-170

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On January 29, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

PUBLISH IN FULL

ROSE CALCESE, as Special Admin-)	
istrator of the Estate of Charles)	
Calcese, Deceased,)	
)	
Plaintiff-Appellant,	)	Appeal from the Circuit
	)	Court for the Nineteenth
v.	)	Judicial Circuit, Lake
	)	County, Illinois.
CUNNINGHAM CARTAGE INC., a corpo-)	
ration, and ROBERT M. CUNNINGHAM,)	
)	
Defendants-Appellees.)	

MR. PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

Charles Calcese sued the defendants Cunningham Cartage Inc., a corporation, and Robert M. Cunningham, its driver, to recover damages for personal injuries suffered in a motor vehicle collision. The defendants were found not guilty of negligence in a jury trial. The jury also found, in response to a special interrogatory, that the plaintiff was free of contributory negligence. Subsequently Charles Calcese died and this appeal has been filed by his wife, acting as special administrator of his estate.

The plaintiff contends that a verdict should have been directed in favor of the plaintiff or that a judgment N.O.V. should be entered because the general verdict of the jury cannot stand as a matter of law based on the evidence. Alternatively the plaintiff argues that the general verdict is inconsistent with the



jury's finding that the plaintiff was not guilty of contributory negligence. He also claims that various trial errors mandate a new trial.

The accident occurred at the intersection of State Route 120 and Fairfield Road in Lake County, Illinois, at approximately 5:30 A.M. on April 16, 1969. Charles Calcese was driving his automobile south on Fairfield Road on his way to his employment. The defendant, Robert M. Cunningham, as an employee of the defendant corporation was driving east on Route 120 in a tractor-trailer truck with a load of gravel. State Route 120 is a preferential highway and there is a stop sign for traffic on Fairfield Road at the intersection. At the time of the accident there was what was generally characterized in the record as a "dense fog". It was also "drizzling" and "dark".

The defendant, Robert M. Cunningham, testifying under adverse examination said that on the morning of the accident he had picked up his load at the McHenry Sand and Gravel Pit located approximately five miles west of the intersection in question and was headed for the atomic energy plant in Zion, Illinois. His truck was a tractor-trailer unit weighing 70,000 pounds loaded. It was equipped with a total of 16 forward shifts. He said that he drove his vehicle in the sixth gear which at its highest speed would probably go 37 to 38 miles per hour. The highest speed he attained in the five miles between the gravel pit and the intersection was 35 miles per hour and he stated that just prior to the collision he was going between 30-32 miles per hour. His driving lights were on low beam. He had amber fog lights and five lights across the top of the cab, together with numerous lights on both sides of the trailer towards the front and rear.

He said that he sounded his air horn, which could be heard for more than 200 feet, when he was approximately 150 feet from



the intersection. At that time he said he could see a street light on one corner of the intersection and some house lights in the trailer court area located there.

He testified that the front of his tractor was in approximately the center of the intersection when he first saw the plaintiff's vehicle, which was only a foot or two away, alongside him.

A court reporter, who took Cunningham's statement on the day following the accident, stated that Cunningham said he was going about 40 miles per hour at the time of the occurrence, and that as he approached the intersection he could see only a car length or two because of the density of the fog. When questioned about this statement, Cunningham said he did not recall making the statement as to the 40 mile per hour speed. As to the visibility, he explained that there were previous areas where he could see only two car lengths but as he approached the intersection he could see the 150 feet.

Charles Calcese testified that he lived on Fairfield Road approximately two miles north of the intersection and that he started to work about 5:30 A.M. on the day of the accident, driving south on Fairfield Road to the intersection where he intended to cross Route 120 and continue south.¹ He said he tested his lights, horn and brakes that morning before leaving his house. He stated that, because of the fog, in some places heading south he could hardly see in front of his car, and in other spots the visibility was not over 50 feet. He had on his head lights and windshield wipers.

He came to a complete stop at the white line located some five or six feet south of the stop sign on Fairfield Road, lit a cigarette at that point, looked to his left, then to his right and observed no traffic approaching from either direction. He then proceeded into the intersection. He had traveled approximately five

or six feet into the intersection when he saw the flickering lights of what seemed to be a trailer to his right and in one to three seconds the collision occurred. He was not positive whether the front of his car had reached the center line of Route 120 at the time of the collision. He did not hear a horn.

He said he told the officer who interviewed him in the hospital that he had hit or attempted to hit his brakes and all he could see or feel was gravel. The officer testified that Calcese told him that upon approaching the intersection he applied his brakes and failed to stop because of sand or gravel. The officer also testified that he found no signs of skid marks of either vehicle prior to the point of impact.

Based on the facts in the record and the inferences from the facts which the jury could draw, we conclude that the verdict was not against the manifest weight of the evidence. The visibility at the particular time and place was a matter for the jury to decide under the conflicting evidence and the inferences which could be drawn from it. The plaintiff's argument that it is unlikely that the accident could have happened if the defendant's testimony is to be believed is speculative and a theory which was fully argued to the jury. There was, on the whole record, evidence which the jury could find credible that the defendant who was on a preferential highway was not proceeding at an excessive rate of speed, that his truck was properly lighted and that he attempted to warn of his approach by sounding his air horn. The finding that he was not negligent under these circumstances is not against the manifest weight of the evidence. See Ruggiero v. Public Taxi Service, Inc. (1973), 16 Ill.App.3d 754, 760; Legerski v. Nolan (1971), 132 Ill. App.2d 51, 54.

This conclusion also stands as an answer to the plaintiff's argument that it was error not to enter a judgment N.O.V. which

requires even more conclusive evidence than that necessary to justify a new trial. See Pedrick v. Peoria & Eastern R. R. Co., (1967), 37 Ill.2d 494, 509-510.

The plaintiff next contends that the answer to a special interrogatory in which Charles Calcese was found not guilty of contributory negligence is inconsistent with, and controls the general verdict which found the defendant not guilty of negligence. (See Freeman v. Chicago Transit Authority (1965), 33 Ill. 2d 103, 106.) We do not, however, find them inconsistent in this case. To establish a case of negligence it is incumbent upon a plaintiff to not only prove freedom from contributory negligence but also to prove that the defendant driver was negligent and that his negligence proximately caused the collision and resulting injuries. Here, the jury could have found from the evidence that plaintiff was free from contributory negligence, believing that he stopped and proceeded across the intersection using reasonable care, but that defendant had also proceeded on the preferential highway using reasonable care under the circumstances. The jury could have reasonably concluded that due to the foggy conditions both drivers were prevented from seeing the other in time to avoid the accident, and thus that neither driver was chargeable with negligence. See Legerski v. Nolan, 132 Ill.App.2d 51, 54-55.

Dursch v. Fair (1965), 61 Ill.App.2d 273, Stone v. Warehouse & Terminal Cartage Co. (1955), 6 Ill.App.2d 229, and Cornwell v. Bloomington B. M. Ass'n, (1911), 163 Ill.App. 461 are cited by the plaintiff as authority for the claim that the jury could not find that the accident was unavoidable on the facts before them. We do not find the cases persuasive. In Dursch, the defendant drove his car into the rear of a truck. There was substantial evidence that he was asleep at the time and there was no evidence introduced

concerning weather conditions which could affect visibility. In Stone, there was a conflict as to respective distances and speeds of two vehicles which collided at an unregulated intersection. The court found that there was no evidence to indicate that the occurrence was without fault of either party on the facts which did not include any problems of visibility. In Cornwell, the defendants offered no evidence to show that the accident was caused other than by their negligence as disclosed by the plaintiff's evidence. The court ruled that it was not error for the trial judge to refuse to give an instruction that the injury was caused by a mere accident without fault or neglect on the part of the defendants. Here, by contrast, although there was evidence from which the jury could find that the plaintiff was not guilty of negligence, there was also evidence which justified a finding that defendant was not negligent.

The plaintiff claims that he was substantially prejudiced by the conduct of the defendant's counsel in reading from a police report which was not in evidence in his closing argument. While the plaintiff contends that this was repeated after objection and admonishment by the court, the certified record before us, which imports verity (see Kazubowski v. Kazubowski (1970), 45 Ill.2d 405, 416; People v. Spence (1971), 133 Ill.App.2d 171, 172), reveals only the following:

" *** Mr. Calcese was testifying, he talked to a deputy and he said, I told the deputy that I applied my brakes but all I saw was gravel.

That's sort of a vague statement to make here. The implication was, crawling out, or what, I don't know, but I know that investigating police officers prepared this report like an hour or two after the accident, after he could immediately talk to these people and he doesn't have anything to do with this case, except for, through his job as an investigating officer. And he has stated that Mr. Calcese told him he was traveling south on Fort Hill Road and upon approaching the stop sign --

MR. STRUGALA: I beg your pardon. Objection. What is he reading from?

THE COURT: It should be from the evidence.

MR. STRUGALA: I would like to be heard on a motion right now, if the Court please.

THE COURT: I would ask the jurt (sic) to consider the evidence they hear in this case, and you heard the evidence from the witness stand. I would just as soon limit the argument."

It is, of course, improper to refer to a police report which is not in evidence. (See Anderson v. Universal Delta (1968), 90 Ill. App.2d 105, 111-112.) In this case, the trial judge did not err in ruling in his discretion that the error was not prejudicial. The objection was quickly sustained before the jury was informed of substantial details of the report, and the partial reference which was heard by the jury concerned matters to which the police officer previously testified on the stand and which only affected the issue of plaintiff's contributory negligence. The fact that the jury found the plaintiff not guilty of contributory negligence indicates that the improper reference to a police report not in evidence did not prejudice the plaintiff. See Redding v. Schroeder (1964), 54 Ill.App.2d 306, 314-315.

The plaintiff further contends that the court erred in refusing his offer of proof which he claims would have impeached the defendant's testimony that he was traveling only at 30-32 miles per hour at the time of the accident and his testimony as to the highest speed which his truck could reach. The tendered proof was to the effect that the maximum number of daily trips the defendant ever made between the pit where he picked up his load of gravel and the 30 miles to his destination in Zion was six, and that his truck could travel at 55-60 miles per hour on a down grade. We conclude that the trial court properly refused the tender of proof because it was both irrelevant and non-impeaching.

Relevancy is established where a fact offered tends to prove a fact in controversy or renders a matter in issue more or less

probable in the light of logic, experience and accepted assumptions of human behavior. (Marut v. Costello (1966), 34 Ill.2d 125, 128.)

There was nothing in the testimony to establish how many trips the defendant would have made that particular day, and moreover, there is no substantial relationship between an average speed and the rate of speed the defendant would be traveling at any one moment. Similarly, the offer to prove the speed at which the truck was capable of traveling did not impeach the defendant's testimony on a material matter. He had testified that the truck could travel at 52 miles per hour and reach at least 55 miles per hour on down grades.

For the reasons stated, we affirm the judgment below.

Affirmed.

GUILD, J. and HALLETT, J. concur.

3D

25 I.A. 87

74-224

ple vs. Eddie Lee Chalk

STATE OF ILLINOIS



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-five within and for the Third District
of Illinois:

Present— PC

HON. ALLAN L. STODER, Presiding Justice

HON. JAY J. ALLOY, Justice

HON. RICHARD STENGEL, Justice

HON. TOBIAS BARRY, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on
January 31, 1975 the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS
Third District
A. D. 1975.

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
vs.	)	Appeal from the
	)	Circuit Court of
	)	Peoria County
EDDIE LEE CHALK,)	
	)	Richard E. Eagleton
Defendant-Appellant.	)	Presiding Justice

PER CURIAM

Abstract

This is an appeal from a judgment of the Circuit Court of Peoria County which found defendant guilty, after a jury trial, of the unlawful delivery of a controlled substance(heroin) of less than 30 grams. Chalk was sentenced following a presentence hearing to a term of from 3 to 9 years in the penitentiary. The office of the State Appellate Defender was appointed to represent defendant in the appeal in this Court. Such Appellate Defender has now moved for leave to withdraw as counsel on appeal in accordance with the precedent in Anders v. California, 386 U.S. 738. The Appellate Defender asserts, after a careful examination of the record, that the conclusion must be reached that an appeal would be wholly frivolous and without possibility of success. The motion for leave to withdraw was accompanied by a brief in support of counsel's conclusion.

The record indicates that defendant, Eddie Lee Chalk, was approached by one Grover Webb of the I.B.I., working undercover, on June 8, 1973, at a place where Chalk normally would be found in front of a shop called Psychedelic Stop in Peoria, Illinois. Webb asked Chalk for five capsules of heroin and, with very little conversation, Chalk walked around to the side of the Psychedelic Stop and gave Webb a bottle containing five capsules for which Webb paid Chalk \$50 and left the area. Following the purchase of the heroin, it was placed in a bottle and the continuity of possession was clearly shown at the time of the introduction of such evidence at the trial of defendant.

At the trial, defense counsel questioned Webb as to how the decision was made to arrest the defendant when Webb knew only his first name. Webb testified that he had identified a "mug shot" of defendant after he had given a physical description to the Peoria Police, including the location where defendant was known to "hang out". He was advised by the police that the person described had to be Eddie Chalk. Defendant was positively identified by Webb at the trial as the person who sold him the five capsules containing heroin. Defense counsel tried to shake Webb's identification of defendant by pointing to discrepancies in the actual height of Chalk who was 6'3" and who was described by Webb as being 6'. Webb's identification, however, was clear and unequivocal.

Clearly there was evidence in the record from which the jury could conclude that defendant was proven guilty beyond a reasonable doubt. The chain of possession was clearly shown so that custody of the heroin was clearly traced and there was no evidence of tampering or opportunity to tamper by any other person than those who had proper custody of the heroin. (People v. Anthony, 28 Ill. 2d 65, 190 N.E.2d 837).

Webb testified that he had observed a narcotics transaction involving Eddie Chalk the day before the transaction in question. He also testified that he was able to identify him as "Chalk" as the result of viewing a "mug shot" as we have indicated. While the rule generally is that admission of evidence of other crimes constitutes prejudicial error, an exception to that rule allows the admission of evidence when the other offense fairly tends to prove the offense charged or works to place the defendant in proximity as to time and place or aids in establishing identification of defendant. (People v. Spencer, 7 Ill. App. 3d 1017, 288 N.E.2d 612). Testimony of Webb was relevant since it aided in identification of defendant and was actually elicited by defense counsel. It was also relevant because it proved Chalk's reasons for selling to Webb, who was a stranger to Chalk, by reason of the fact that he was present at the time Chalk sold to another person. Any prejudice caused by such evidence is outweighed by the probative value of the testimony, particularly since defendant had raised the question concerning Webb's reason for

approaching Chalk and Chalk's motive for selling to Webb.

In the closing argument, the prosecutor referred to Chalk as a "known drug pusher" who should be taken off the streets. There was no objection to reference to defendant as a known drug pusher and while such comments could be prejudicial error under other circumstances, there is sufficient evidence in the record in this cause to justify the comment as a reasonable inference from the evidence. Webb testified to two narcotics sales made by defendant. Any prejudicial effect resulting from evidence should be viewed as harmless error in view of the overwhelming evidence of defendant's guilt. (Chapman v. California, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S.Ct. 824). The court also instructed the prosecutor to argue the facts as presented to avoid leading the jury to speculate.

Chalk was sentenced to not less than 3 nor more than 9 years imprisonment. While not the minimum that might have been imposed, the sentence is within the penalty range authorized for violation of the statute involved. (Ill. Rev. Stat., 1973, ch. 56½, sec. 1401(b); Ill. Rev. Stat., 1973, ch. 38 secs. 1005-8-1(b)(3) and (c)(3)). The trial judge took note of defendant's history and prior offenses, including three prior convictions for aggravated battery and specifically found that the imposition of a higher minimum sentence than the statutory one year minimum was justified in the case.

In view of the record in this cause, we concur in defense counsel's conclusion that there is no basis for maintaining an appeal in this Court and that a continuation of the appeal would be wholly frivolous and could not possibly succeed. The judgment of the Circuit Court of Peoria County is, therefore, affirmed and the motion of the State Appellate Defender to withdraw as counsel for defendant Eddie Lee Chalk is allowed.

Judgment Affirmed and
Withdrawal Motion Allowed.

73-407

25 I.A. ^{3D} 100

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 2nd day of December, in the year of our Lord one thousand nine hundred and seventy-four, within and for the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice

Honorable WALTER DIXON, Justice

Honorable THOMAS J. MORAN, Justice

LOREN J. STROTZ, Clerk

WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On February 3, 1975 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

FILED

FEB 3 1975

No. 73-407

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

ALICE LOUISE JOHNSON,
Plaintiff-Appellant
v.
GEORGE MICHAEL JOHNSON,
Defendant-Appellee.

Appeal from the Circuit
Court of the 17th Judicial
Circuit, Winnebago County
Illinois

MR. JUSTICE DIXON delivered the opinion of the court:

Plaintiff was given a judgment for divorce from the defendant on the 12th of October, 1972 by the Circuit Court of Winnebago County. She was given custody of two children then aged 3 and 5 and defendant was ordered to pay child support in amount of twenty dollars a week for each child.

On July 13, 1973 plaintiff filed a petition for Rule to Show Cause against defendant alleging his failure to pay child support in amount of \$571.00 past due and also failure to pay plaintiff's attorneys fees and costs as provided in the decree. On the 20th of July 1973 the court heard arguments of counsel and informal statements of the parties but no sworn testimony was taken. The parties stipulated that child support arrearage was then \$606.00 and the court fixed the arrearage at that amount. The parties stipulated that the attorney's fees and court costs past due had in fact not been paid. The Court then, with no petition by defendant for a reduction, reduced defendant's obligation to pay child support from \$40 to \$30 per week, ordered the defendant pay the arrearage of \$606 at the rate of \$5.00 per week and continued the request for attorney's fees and costs for 6 months.

The issue presented for review is whether the trial court, in the absence of any showing of a change of circumstances and in

the absence of a petition seeking to modify the decree as to child support, may modify the decree by reducing defendant's support obligation.

There is no brief in this court on behalf of defendant. It is well settled that lack of brief by the appellee permits reversal with no discussion of the merits. If it would be manifestly unjust to reverse pro forma, the court may exercise its discretion and consider the appeal on its merits. 2 I.L.P. Appeal and Error, Sec. 560. After examining the record and the issues we have determined that pro forma reversal is the appropriate action.

Accordingly, the judgment of the circuit court of Winnebago County reducing child support is reversed and the cause remanded to the trial court with direction to re-establish child support in the amount set by the original decree.

Reversed and remanded, with directions.

Rechenmacher, P.J., and T.J. Moran, J. - concur

25 I.A. 117

(24540-4M-9-70) 160-o



STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HAROLD F. TRAPP, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 6th day
of February A. D. 19 75, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

FILED

FEB 6 1975

Robert L. Conn, CLERK
APPELLATE COURT 4TH DISTRICT

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12487

Agenda No. 74-195

ELMER BARTOLO, doing business as
Bartolo Trucking and Excavating Company,

Plaintiff-Appellee

v.

SKAGGS CONSTRUCTION COMPANY, INC.,

Defendant-Appellant

and

The City of Springfield, Illinois,
a municipal corporation,

Defendant.

Appeal from
Circuit Court
Sangamon County
3173-70

Mr. JUSTICE CRAVEN delivered the opinion of the court:

The defendant appeals from a judgment entered in favor of plaintiff in the amount of \$2355.75, plus costs for the rental of a piece of construction equipment known as a hydra-hammer.

This cause was tried before the court without a jury upon the basis of Count II of an amended complaint in which the plaintiff alleged that on September 4, 1969, the defendant rented the hydra-hammer from the plaintiff at "the usual and customary rental fee" of \$900 per month and that the defendant used the



piece of equipment from September 4, 1969, through January 13, 1970. Plaintiff asked damages in the amount of \$3825.

Although there is much conflict with reference to certain aspects of the testimony in this case, there is essentially uncontradicted evidence that the plaintiff purchased this piece of equipment in 1966 and that the defendant had on many prior occasions leased the equipment from the plaintiff. The usual and customary practice as between the parties was for the defendant to keep a record as to the hours of use, notify the plaintiff, and the plaintiff would thereafter bill the defendant at the rate of \$13.50 for each hour of use. There is a conflict in the testimony as to whether or not the plaintiff furnished an operator with the equipment.

Plaintiff in his testimony acknowledged the prior arrangement, but indicated that as to the September 4, 1969, rental, the rate would be on a basis of so-called AED [Associated Equipment Distributors] rates, being the 1969 compilation of nationally averaged rental rates, a copy of which ratebook was offered and received in evidence. Plaintiff did testify, however, that the last piece of equipment that he rented on the basis of the AED rates was sometime in 1961 or 1962 to a local construction company.

With reference to the particular period of time here involved, the plaintiff testified that he spoke by telephone to either Nick Skaggs or Bob Skaggs, both of the defendant-company,

concerning the rental and stated that the rental basis would be the AED book rate. He further testified that he and the defendant did not specify the period of time for which the defendant was renting the hydra-hammer.

The evidence is undisputed that the secretary-bookkeeper of the defendant kept track of the actual hours of usage and, following the prior practice as between the parties, notified or sent copies of such information to the plaintiff. Such information was based upon a so-called daily equipment rental report and during the period of time here involved indicated 38-1/2 hours of use. The defendant acknowledges an indebtedness to the plaintiff in the amount of \$519.75 for that use at the rate previously charged.

Notwithstanding the fact that the second amended complaint sought to recover on the basis of an alleged express contract, by the terms of which the AED rental rate was alleged to have been the agreement of the parties, the trial court entered judgment based upon 38-1/2 hours of use at \$13.50 an hour for the period of time September 4, 1969 to December 1, 1969, and then a rental charge at the AED rate for the period December 1, 1969 to January 13, 1970, and entered judgment for the combined total of \$2355.75.

Plaintiff in its brief defends this judgment based partly upon custom and usage and partly upon a finding of an express contract, by stating:

"The disputed contract is a hybrid. It's partly implied, partly expressed, partly new and partly old. The evidence showed that the Plaintiff had rented the machine on several prior occasions to the Defendant at the rate of \$13.50 per hour



for very brief intervals and that the Defendant's practice was to pick the machine up and bring it back after he was finished. It would then report the total hours of usage to the Plaintiff. The real rental rate for the prior periods is beclouded somewhat by conflicting testimony as to whether the rate included an operator."

We cannot accept this recitation nor sustain the judgment entered upon this record. Contracts may be express or implied. Express contracts are those in which the terms of the contract or agreement are openly and fully uttered and avowed at the time of the making. Contracts may be implied in fact or in law, based upon an ordinary course of dealing and a common understanding. By definition, the existence of an express contract covering all the terms and conditions of the agreement between the parties precludes a search for or inquiry into the existence of an implied contract. See I.L.P. Contracts, §§ 3-4.

Based upon the pleadings in this case, the plaintiff had the burden of proving the existence of an express contract. The proof does not establish the existence of such a contract. In C. Iber & Sons, Inc. v. Grimmett, 108 Ill.App.2d 443, 248 N.E. 2d 131, the plaintiff sought to recover for the alleged breach of a contract made during the course of a telephone conversation and the evidence was in conflict as to the parties reaching an agreement. In that case, as here, there was not showing that the defendant agreed to, or accepted, the terms testified to by the plaintiff. Such agreement, of course, is fundamental to the



existence of an express contractual relationship. The finding of the trial court as to the existence of an express contract is contrary to the manifest weight of the evidence and cannot be sustained. Since the defendant concedes that it is indebted to the plaintiff in the amount of \$519.75 and since the plaintiff did not cross-appeal from that portion of the trial court's finding that the machine was used for 38-1/2 hours and that the defendant owed \$13.50 for each hour of use, the judgment of the circuit court of Sangamon County is reversed and this cause is remanded to that court with directions to enter judgment for the plaintiff in the sum of \$519.75.

REVERSED AND REMANDED WITH DIRECTIONS.

TRAPP, P.J., and SMITH, J., concur.



No. 59678

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 v.)
)
 JOSEPH ASHTON,)
)
 Defendant-Appellant.)

APPEAL FROM THE
 CIRCUIT COURT
 OF COOK COUNTY

 HONORABLE
 ROBERT MASSEY
 PRESIDING

Mr. PRESIDING JUSTICE SULLIVAN delivered the opinion of the court:

After a jury trial, defendant was found guilty of robbery and sentenced to a term of five to ten years. On appeal he contends (1) it was error to give the jury an instruction and a verdict form for robbery when he was indicted only for armed robbery; (2) he was denied a fair trial, because (a) the State presented evidence and elicited testimony violating his right to remain silent while under police investigation; (b) the State attempted to shift the burden of proof by implying that defendant failed to produce witnesses; and (c) comments were made during closing argument that defendant had accused the State's witnesses of lying; (3) the court improperly allowed the State to impeach him by the record of two prior burglary convictions; and (4) his sentence exceeds the minimum provided by the Unified Code of Corrections.

The record discloses that Kenneth Moss and Linda Vasquez, then his girlfriend and now his wife, were in an auto parts store when defendant approached and offered to sell an automobile tape player for \$20. Moss had made a purchase in the store and put the change (a ten dollar bill and two singles) in his wallet when defendant was standing next to him. Linda then went to Moss's car to wait as Moss walked with defendant to a nearby apartment building to examine the tape player. There, defendant opened an unlocked door and they entered a hallway where Moss saw the tape player on the stairway. Moss examined it and told defendant he was not interested. Defendant then drew a knife about six inches in length, held it in front of Moss, took Moss's wallet, removed the money from it, and fled up the stairs. Moss ran to his car

and told Linda that defendant had used a knife to take his money. Moss then drove to a police station, where he reported the robbery. The police returned to the building with him but were unable to locate defendant. Five days later a police officer saw a man in the area of the robbery who matched the description given by Moss. This man, later identified as defendant, was talking with two other men, one of whom told the officer that defendant was trying to sell them a hi-fi and some tapes. The names of these men were not obtained, but defendant was taken into custody. A lineup was conducted and Moss and Linda identified defendant, who was then charged with armed robbery.

Defendant's testimony was substantially different than that of Moss's. He testified that he met Moss in the auto parts store and offered to sell him a tape player. When they arrived at the apartment building, he told Moss he was trying to sell the instrument for a friend, Sam Wootin, and that it was in the second floor apartment of Wootin's girlfriend, Anne. Moss refused to go upstairs and asked him to go up and bring the tape player down. He asked Moss to trust him with \$14 so that he could get the player. He was given the money and went upstairs, but Wootin's girlfriend would not give him the tape player without Wootin's permission. He was upstairs about ten minutes, and when he returned Moss was gone and he was unable to find him at the auto parts store. Defendant did not tell the police that the transaction was voluntary, because he was not asked concerning it, and he first told his attorney only a few days before trial that the attempted sale was for Wootin. The jury was given instructions and verdict forms for both armed robbery and robbery, after which defendant was found guilty of robbery.

OPINION

I.

It is first contended that the court erred in giving the robbery instruction and verdict form, because the only evidence

presented was of an armed robbery. He points out that Moss testified that defendant held a six-inch knife in front of him when his money was taken, and he argues that the jury had only two alternatives, either to believe him and find him not guilty or to believe Moss and find him guilty of armed robbery. Thus, he reasons the conviction of robbery must be reversed.

In support of this argument, he refers us to People v. Keagle, 37 Ill.2d 96, 224 N.E.2d 834 and People v. Newman, 360 Ill. 226, 195 N.E. 645. In Keagle, it was held that where the evidence admits of only one conclusion, that defendants there were guilty of armed robbery or not at all, it was error to instruct the jury as to unarmed robbery or to have permitted the jury to find them guilty of that offense. There was no testimony in that case that defendants were unarmed. In Newman, defendant was indicted for murder, and after the jury was given murder and manslaughter instructions and verdict forms, he was found guilty of manslaughter. The supreme court found there was no evidence to support his guilt of manslaughter.

We do not find Keagle or Newman to be controlling here, for the reason that although Moss testified defendant held a knife, this was denied by defendant, which raised an issue of whether armed or unarmed robbery was committed. We believe the reasoning of People v. McVet, 7 Ill.App.3d 381, 287 N.E.2d 479, should apply. There, at pages 386 and 387, the court said:

"The general rule is that when an offense includes a lesser offense, a defendant may be convicted of the lesser offense if the evidence is contradictory. (Citation.) In such cases, a defendant may not complain that an instruction on the lesser charge was given, or that the evidence would have justified the jury in convicting on the more serious offense.

* * * Under this evidence, we cannot conclude that the only possible findings were of armed robbery or innocence. The jury was justified in its finding of simple robbery and it was not error for the court to submit the verdict form for that offense."

In the instant case, the jury could have accepted the testimony of Moss that he was robbed by defendant and that a knife was

used, in which event it could only have found defendant guilty of armed robbery. Alternatively, the jury could have found that a knife was not used.

In view of the foregoing, we conclude that it was not error to give the robbery instruction and verdict form.

II.

Defendant next contends that he was denied a fair trial because (1) evidence was presented and testimony elicited which violated his constitutional right to remain silent while under police investigation; (2) comments were made by the prosecutor during his cross-examination and in closing argument concerning his failure to produce witnesses; and (3) a statement was made in closing argument that defendant had called the State's witnesses liars.

In the first instance, defendant maintains that during the direct examination of the State's rebuttal witness, Officer McGuire, repeated references were made to the fact that defendant remained silent and refused to relate his version of the occurrence until trial, thereby making it appear his testimony was fabricated.

Defendant testified that at the time of his arrest he was unemployed and had engaged in a voluntary transaction with Moss for the purchase of the tape player. During his cross-examination, the following colloquy occurred:

"Q. You made a statement to the police at that time, did you not?

A. Made a statement to the police?

Q. Yes.

A. About what?

Q. About this offense.

A. Yes, sir. I told them I was not guilty of armed robbery. That is what they charge me with.

Q. You said I'm only out on the street tryin' to make a buck, didn't you tell them that?

A. No, sir, never.

* * *

Q. You didn't tell the police that you went and you had a voluntary transaction with them? That he was going to buy a tape player from you, did you?

Mr. Rosen (Defense Counsel): Objection.

The Court: Overruled.

Q. You didn't tell them that?

A. No, no, he didn't question me about anything about it.

Q. In fact, you refused to make any statement?

A. I didn't refuse to make it. Nobody asked me anything about it.

Q. You were arrested and you were in custody, and under arrest you didn't say anything to the police about this voluntary transaction?

A. No, sir, he charged me with armed robbery, and that was it.

Q. You were locked up and you didn't make any statement about this, did you?

A. That is correct.

Q. You didn't tell the police that you met Linda Vasquez and Mr. Moss in Warshawsky's, did you?

A. No, sir.

* * *

Q. You didn't tell the police about Samuel Wootin, did you?

A. No, sir."

Subsequently, the State's rebuttal witness, Officer McGuire, testified as follows:

"Q. You had a conversation with him, didn't you?

A. Yes.

Q. You advised him of his constitutional rights?

A. Yes.

Q. And he refused to make any statement didn't he?

A. Yes, sir."

Officer McGuire further testified that when he advised defendant of his rights and told him that he had been identified as a man who committed a robbery, defendant stated:

"Man, all I'm out here is tryin' to make a couple of bucks. I don't rob people."

McGuire indicated in his police report that defendant denied any knowledge of the crime and refused to make a statement.

Defendant contends that reversible error resulted because of the above set forth cross-examination and further testimony elicited from Officer McGuire. He refers us to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, where rules were set forth regarding defendant's right to remain silent while in custody. The court stated therein:

"In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." 384 U.S. 468 n. 37.

In further support of his contention, defendant invites our attention to People v. Gates, 14 Ill.App.3d 367, 302 N.E. 2d 470; People v. Lampson, 129 Ill.App.2d 72, 262 N.E.2d 601; People v. Rothe, 358 Ill. 52, 192 N.E. 777. In Gates, defendant did not tell the police upon arrest that he acted in self-defense, but did so testify at trial. Over objection, the prosecution (1) cross-examined defendant about his failure to tell the police that he had acted in self-defense; (2) elicited testimony from several witnesses that defendant was silent when arrested; and (3) repeatedly stressed in closing argument that defendant had not raised his claim of self-defense until after his arrest. The court reversed, holding that the prosecutor, by eliciting evidence and commenting upon the fact that defendant remained silent, could have directly influenced the jury in their deliberations as to defendant's guilt since it appeared as though defendant fabricated the concept of self-defense at trial. In Lampson, the admission of testimony of police officers which informed the jury that defendant had refused to make a statement and had asked for an attorney, neither of which facts could have had any bearing on defendant's guilt or innocence, was deemed prejudicial error. In Rothe, the court held that it was prejudicial error to allow the prosecution to prove by an officer that defendants refused to make a statement at the police station.

Defendant also argues that the statement allegedly made by him to the officer, "Man, all I'm out here is tryin' to make a couple of bucks. I don't rob people.", must be construed as a denial of the commission of the crime charged and was not such an admission or statement regarding the occurrence which would allow the prosecution a basis for impeaching his credibility.

The State contends this was a statement which denied the robbery and, because it contradicted his trial testimony concerning how he obtained Moss's money, it was proper to use it to attack defendant's credibility. It argues the issue was not

defendant's right to remain silent, but rather, his credibility stemming from his failure to give the same version to the police.

In Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1, the U.S. Supreme Court limited the application of Miranda, stating at page 224:

"Some comments in the Miranda opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. Miranda barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from Miranda that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards."

The Harris court then concluded that once a defendant freely testifies in his own behalf, the fifth amendment does not bar a prosecutor from introducing for impeachment purposes evidence of prior statements inconsistent with defendant's testimony at trial. It is evident that the Harris decision refused to allow the "shield provided by Miranda" to be turned into a "license to use perjury by way of a defense," free from the truth-testing device of cross-examination. Harris, supra, at page 226.

In United States v. Ramirez (5th Cir. 1971), 441 F.2d 950, defendant testified at trial that he had been coerced into selling heroin by strangers who had threatened harm to him and his family. On cross-examination, the prosecutor elicited from defendant the testimony that he had never told the police the story prior to trial. On appeal, the Fifth Circuit approved this form of impeachment relying on Harris, supra, stating at page 954:

"The analogy of Harris to the case at hand is inescapable. Once Ramirez elected to testify and assert the defense of coercion he became subject to the 'traditional truth-testing devices of the adversary process', including the right of the prosecution to show his prior inconsistent act of remaining silent at the time of his arrest. Thus, the district court was not in error in allowing the government to cross-examine Ramirez about his silence."

In People v. Queen, 8 Ill.App.3d 858, 290 N.E.2d 631, defendant argued that when he made an exculpatory statement during trial, his right against self-incrimination continued so that the State was precluded upon cross-examination from attempting to impeach him by asking whether he had previously made such a statement to the police. The court held that the State was not precluded from cross-examining him in regard to that statement and bringing out the fact that he at no time had related such story to the police and was telling it for the first time at trial. Such cross-examination did not infringe defendant's constitutional privilege against self-incrimination.

Initially, we disagree with defendant that this issue is controlled by People v. Gates, supra, because in Gates defendant was questioned concerning statements after he had been placed in police custody, but before he was advised of his constitutional rights. In the case at bar, defendant had been informed of his rights prior to denying his guilt.

Furthermore, we also believe that Lampson and Rothe, cited by defendant, do not apply, since they involve testimony that defendant refused to make a statement to the police after his arrest. Such testimony is clearly erroneous and prejudicial. The record before us does not disclose any evidence that defendant ever refused to make a statement here.

Assuming arguendo, that defendant did remain silent at the time of arrest, we are of the opinion that, under the rationale of Ramirez, when defendant elected to testify and give his explanation of the occurrence, he became subject as stated in Ramirez "to the traditional truth-testing devices of the adversary process," including the right of the prosecution to show his prior inconsistent act of remaining silent at the time of his arrest. Silence at the time of arrest may be considered when a jury evaluates a defendant's explanation. Ramirez, supra; People v. Queen, supra.

In the instant case, however, defendant did not remain silent. He testified at trial that he told the police he "was not guilty of armed robbery," and Officer McGuire testified that defendant stated:

"Man, all I'm out here is tryin' to make a couple of bucks. I don't rob people."

The search for the truth is and must always be the primary object of the criminal justice system. Since the record does in fact reflect that defendant made a statement to the police following his arrest, his credibility was appropriately impeached by use of his earlier inconsistent statements. We conclude therefore that reversible error did not result from the presentation of evidence and the elicitation of testimony by the State. People v. Queen, supra.

In the second instance, defendant maintains that the prosecutor improperly implied in his cross-examination of defendant and in his closing argument that defendant had an obligation to produce defense witnesses, thereby attempting to shift the burden of proof to defendant. During cross-examination of defendant, the following colloquy occurred:

"Q. Where is Samuel Wootin right now?

A. I'm in hopes that he is down there on 1220 South State Street. I have informed my people that I'm in trouble about the tape player and that I tried to sell it for him.

Q. He never came forward?

A. No, sir he didn't come forward.

Q. And Anne never came forward either?

A. No, sir, she hasn't come forward as of yet.

Q. And your friend Mr. Wootin has not come to Court, has he?

A. No, he hasn't."

In his closing argument, the prosecutor stated:

"And then what other preposterous things does he tell you, * * *? Well, another thing that he tells you is that oh, I was selling that tape deck for Samuel Wootin, a friend of mine. A friend of mine. Now, here is a guy who is locked up, and only tell his attorney a few days ago that Samuel Wootin knows I was going to be selling that tape deck. And Anne knows because she was upstairs at the time.

That is certainly unreasonable. That is an unbelievable story."

Later, the prosecutor went on to state:

"What does Joe tell you? The other part of the defense was I went up and I talked to this unproducable Anne, . . . I asked for this unproducable Sammy Wootin"

Defendant alleges that by this conduct the prosecutor left the impression that he is guilty because he did not produce Samuel Wootin or Anne in court.

He refers us to People v. Pearson, 2 Ill.App.3d 861, 277 N.E.2d 544, where the court held that the prosecutor's conduct of the cross-examination of defendant which implied that defendant had the obligation to call certain witnesses to testify, was prejudicial and grounds for reversal.

We believe that Pearson is distinguishable from the instant case because the court there held that where a person possessing facts having a bearing on the charges against defendant is equally accessible to the prosecution and the defense, it is improper for the State to comment on the failure of the defense to call that individual.

Here, it does not appear the State was aware prior to defendant's testimony as to the names of any person supporting his alibi. Moreover, Anne's last name was never mentioned. In the light thereof, it cannot be said that the witnesses were equally accessible to both sides.

In People v. Sanford, 100 Ill.App.2d 101, 241 N.E.2d 485, it was held that when a defendant injects into the case his activities with potential witnesses during a particular period of time ostensibly for the purpose of establishing an alibi, his failure to produce such witnesses is a proper subject of comment on the part of the State. See also People v. Eickert, 124 Ill.App.2d 394, 260 N.E.2d 465.

Defendant here testified to the fact that Wootin and Anne could support his alibi. Under such circumstances, it was not error for the prosecutor to comment on the failure of defendant

to produce those individuals as witnesses.

In the third instance, defendant maintains that the prosecutor's repeated references in closing argument that defendant called the State's witnesses liars was prejudicial and deprived him of a fair trial. He asserts there is no evidence that he made such reference as to any of the State's witnesses. He argues that this argument overstepped the bounds afforded the prosecution in commenting on the credibility of defendant.

In his trial testimony, defendant stated that certain State witnesses had lied; namely, a police officer who said other persons were present at the time of defendant's arrest and Moss when he said defendant tried to sell Linda Vasquez some wigs. In addition, defendant contradicted other State's witnesses by denying that (1) he robbed Moss; (2) he had a knife; and (3) he said to a police officer that he was just trying to make a couple of bucks and did not rob people.

We will consider defendant's contentions in this regard, although no objection was made in the trial court. (See People v. Romero, 36 Ill.2d 315, 223 N.E.2d 121.) Initially, we note the rule that comments based on the facts appearing in the proof or on legitimate inferences deducible therefrom do not transcend the bounds of legitimate argument. People v. Ostrand, 35 Ill.2d 520, 221 N.E.2d 499.

In People v. Carr, 114 Ill.App.2d 370, 252 N.E.2d 912, defendant was unable to name any of the customers of his alleged employer, and the court found this supported the State's closing argument that defendant had lied about his employment.

The credibility of Moss and defendant was an important factor in the jury's decision, and it appears that both the prosecution and the defense emphasized the untrustworthiness of their opponent's witnesses. From our review of the entire record, we are satisfied that the argument of the State that defendant had said the State's witnesses were liars, was proper comment as a



fair inference drawn from the evidence.

III.

We turn now to defendant's contention that the use of two prior burglary convictions to impeach his credibility denied him a fair trial. Prior to the start of trial, the court denied a motion to exclude from the record any evidence concerning his two prior burglary convictions, one in 1967 and one in 1968. Defendant argues that their admission unfairly prejudiced the jury to conclude that, as a previously convicted defendant, he more than likely committed the offense for which he was presently charged. He further argues this error was compounded when the prosecutor, in closing argument, made repeated references to defendant as an "ex-con," a "burglar," and an "old pro." These errors, he alleges, were in "no way undone" by the written instruction given to the effect that the prior convictions should be considered only insofar as it may affect defendant's credibility as a witness and must not be considered as evidence of his guilt of the crime with which he is charged.

The State maintains (1) that the record of his two prior burglary convictions was relevant and proper under the standards set forth in People v. Montgomery, 47 Ill.2d 510, 268 N.E.2d 695; and (2) that comments in the argument were proper because they were based on the evidence and did not prejudice defendant unfairly.

Defendant counters that the trial court merely paid "lip service" to Montgomery and, in making its determination, considered only the proximity of the prior convictions to the present charge. In Montgomery, the Illinois Supreme Court, referring to Rule 609 of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States stated, at page 519, that "the provisions of this Rule should be followed in future cases."



The provisions of Rule 609 pertinent to the instant case provide that, for the purpose of attacking credibility, evidence of a prior conviction is admissible where, as here, (1) the crime was punishable by imprisonment in excess of one year, unless the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice; and (2) less than ten years elapsed since the date of conviction or release from confinement, whichever is the later date.

In the Advisory Committee comments to this Rule, it is stated that, "'In exercising discretion in this respect, a number of factors might be relevant, such as the nature of the prior crimes, [footnote omitted] the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction. * * * The experienced trial judge has a sensitivity in this regard which normally can be relied upon to strike a reasonable balance between the interests of the defendant and of the public.'" See Montgomery, supra, page 518.

The following colloquy between the trial court and the defense counsel demonstrates that the trial court was cognizant of the Montgomery factors:

"MR. ROSEN: Is the Court also aware that further criteria in making its final determination that it must consider in this particular case, more will be contributed to the search for truth by having the defendant testify?

THE COURT: Yes, I'm considering, also, the statement on page 518 where it says, in exercising the discretion, a number of factors are relevant. The length of the criminal record, and I just talked about that, and the age and circumstances of the defendant, and of course, I took that into consideration, and above all, the extent to which it is more important to the search for truth in the particular case for the jury to hear the defendant's story, than to know of his prior convictions.

I think I took that all into consideration in evaluating these other items. And also, the nature of the crime, and the nearness of the crime, and his



career as a person, and whether the crime is similar to the one that he is charged with. Now, I am taking that all into consideration, and I feel that these convictions that we have talked about should be admitted."

Thus, we believe the record discloses that the judge gave careful consideration required by Montgomery in exercising his discretion.

Concerning defendant's argument that the comments of the prosecutor concerning the prior convictions in closing argument were improper, we note that in People v. Bergeron, 10 Ill.App.3d 762, 295 N.E.2d 228, where defendant testified and his prior criminal record was in evidence, it was held that "comments in final argument referring to defendant as an "ex-con" were not error. A prosecutor may denounce the accused's testimony if he relies on the evidence, and defendant will not be heard to complain of appellations which truly characterize him as shown by the evidence. (People v. Jones, 125 Ill.App.2d 168, 260 N.E.2d 58.) In the instant case, the prosecutor's characterizations of defendant as an "ex-con," a "burglar," and an "old pro" were not improper to the extent they should be characterized as reversible error as they were based on facts in evidence and in the context they were used they related to the weight to be given his testimony. The jury was instructed that the convictions were to be considered only as affecting defendant's credibility and not as indicative of guilt of the offense charged, and we believe the record amply supports the jury's decision and does not disclose that the trial court breached his discretion in determining that the probative value of the prior convictions was not substantially outweighed by the danger of unfair prejudice. See Montgomery, supra.

IV.

Defendant's final contention is that his 5 to 10 year sentence for robbery exceeds the minimum term as provided under the Unified Code of Corrections. Ill. Rev. Stat. 1973, ch. 38, par. 1001 et seq.

The Code, effective January 1, 1973, has classified robbery as a Class 2 felony, and it provides that "[F]or a Class 2 felony, the minimum term shall be 1 year unless the court, having regard to the nature and circumstances of the offense and the history and character of defendant, sets a higher minimum term, which shall not be greater than one-third of the maximum term set in that case by the court." (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(c)(3).) The maximum term for a Class 2 felony is any term in excess of one year not exceeding 20 years. Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(b)(3).

Defendant's trial commenced on April 11, 1973, after the Code became effective. The trial court allowed defendant to choose whether he wanted to be sentenced under the Code or under the prior law (Ill. Rev. Stat. 1971, ch. 38, par. 18-1(b)), in effect at the time the crime was committed. The court advised defendant that under the prior law, he could be sentenced from one to 20 years; while under the Code, he could be sentenced from one to 20 years plus a three year parole term. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(e)(2).) He now complains that the court did not advise him that the prior law did not include the provision of the Code that the minimum term should not exceed one-third of the maximum term, and he contends that his five to ten year sentence is excessive because the minimum is greater than one-third of his maximum term and also that his sentence is inconsistent with the rehabilitative intent of our legislature.

For a number of reasons, it is our considered opinion that the minimum penalty here should be reduced to comply with the mandate of the Unified Code:

First: Even before the effective date of the Code (January 1, 1973), the 1967 Tentative Draft of the American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures, provided, at page 21, "that in order to preserve the principle

of indeterminacy the court should not be authorized to impose a minimum sentence which exceeds one-third of the maximum sentence actually imposed." See approval of this principle in People v. Jones, 92 Ill.App.2d 124, 235 N.E.2d 379.

Second: Defendant here was not informed of the one-third provision although the Unified Code being in effect at the time of sentencing indicated a legislative intent that the provision be applicable.

Third: The sentences for the offense of robbery under the prior law and the Code were substantially the same, except that the Code included a three year probation period and it appears that defendant chose the application of the prior law to avoid the probation period. However, the Code also contained the one-third provision concerning which defendant apparently was not informed, and he may not have made the same choice with knowledge of this provision.

Fourth: There is some doubt regarding the validity of a waiver of sentencing under the Unified Code by defendant herein. He was not informed of the one-third provision, and waiver has been defined as "an intentional abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1019.

Fifth: There is a question as to whether the one-third provision makes sentencing under the Code "less harsh" than the prior law under which defendant was sentenced, and if it could be so considered defendant may avail himself of the provisions of the Code. People v. Chupich, 53 Ill.2d 572, 295 N.E.2d 1.

Defendant has requested that this cause be remanded for resentencing, consistent with the requirements of the Unified Code. However, in view of belief as expressed above, we will apply the provisions of the Code by modifying the judgment appealed from by reducing the minimum sentence from five years to three years and four months. As thus modified, the judgment



is affirmed.

Affirmed as modified.

BARRETT, J. and DRUCKER, J. concur.

Publish abstract only.



PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM CIRCUIT
) COURT OF COOK COUNTY.
Plaintiff-Appellee,)
)
v.)
)
MICHAEL AUSTIN,) HONORABLE
) ALLEN F. ROSIN,
Defendant-Appellant.) PRESIDING.

Before Sullivan, P.J., Drucker and Lorenz, JJ.

Colonel Howard Johnson testified, as a witness for the State, that he is a detective employed by Marshall Field at 111 North State Street in Chicago. At 8:30 A.M. on January 12, 1973, he was on the third floor of its "Store for Men" and observed defendant holding a sweater, a sport coat and a package. It was then 45 minutes before the store opened to the general public, and he questioned defendant as to whether he was an employee, what was his name and number, and what was his purpose in the store. Defendant replied that his name was "Austin"; that he was looking for the personnel office; and that he had gained entrance to the store by way of the service elevator. The personnel office is not located in that building but rather is on the tenth floor of the main Marshall Field Building. The sweater in defendant's possession bore two identification tags, one reading "Store for Men, Marshall Field" and the other "Marshall Field, \$58.00." Defendant was asked for a sales receipt for the property but "none was available." Defendant was escorted to the office of the building and the police were summoned.

Johnson further testified that the property in question was owned by "Marshall Field and Company," which was licensed to do business in the State of Illinois, and that he was an agent of Marshall Field. He did not see defendant pick up the property in question. He identified the sweater and defendant in court.

The State thereupon rested its case, after which defendant rested his case without adducing evidence in his own behalf. The trial court commented that the evidence demonstrated that the store had not been open to the public at the time of defendant's apprehension; that defendant was in possession of property belonging to Marshall Field; that upon questioning by the security guard, defendant failed to produce evidence of purchase, whereas it is "common knowledge" that such evidence is given at the time of a purchase; that the price tags were on the property in question at the time of defendant's apprehension, whereas they are normally removed upon purchase; and that the State proved its case beyond a reasonable doubt.

Defendant's contention that the State failed to prove the corporate existence of the victim of the theft is without merit. The Illinois Supreme Court has held that under common parlance, as well as under the Illinois Business Corporation Act, the use of the term "company" connotes corporate existence. (People v. Whittaker, 45 Ill.2d 491, 259 N.E.2d 787.) It has also been held that, in the absence of evidence to the contrary, the existence of a corporation may be shown by the direct oral testimony of a person with knowledge of such fact. People v. McGuire, 35 Ill.2d 219, 232, 220 N.E.2d 447.

The instant complaint alleged ownership of the property in question in "Marshall Field and Company, a Corporation." Johnson testified that he was an agent of Marshall Field, that he had personal knowledge that Marshall Field was licensed to do business



in the State of Illinois, and that the property in question was owned by "Marshall Field and Company." Johnson's testimony was not rebutted at trial. Therefore the State proved beyond a reasonable doubt that Marshall Field was a corporation licensed to do business in Illinois and that it owned the property in question.

Defendant also contends that the State failed to prove beyond a reasonable doubt that he had exercised unauthorized control over the property in question because it was not proven that Marshall Field owned the property or that defendant had taken that property.

As the foregoing discussion demonstrates, ownership of the property in question was shown to have been in Marshall Field and Company at the time of defendant's apprehension. Further, the elements of theft may be proven by circumstantial evidence.

(People v. Smith, 90 Ill. App.2d 388, 234 N.E.2d 161.) Defendant was found inside Marshall Field's premises prior to opening for the day's business, in possession of garments belonging to Marshall Field. Defendant was unable to produce a sales receipt for the property, and the explanation given by him at that time for his presence in the building was wholly unconvincing. The evidence was sufficient for the trier of fact to conclude that defendant had obtained unauthorized control of the property in question.

The judgment is affirmed.

AFFIRMED.

Abstract only.





3D
25 I.A. 191

No. 59869

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
VINCENT M. GERACI,)
)
Defendant-Appellant.)

APPEAL FROM THE
CIRCUIT COURT
OF COOK COUNTY

HONORABLE
DAVID J. SHIELDS
PRESIDING

PER CURIAM, First District, Fifth Division
Before SULLIVAN, P.J., DRUCKER and LORENZ, JJ.

After a bench trial, defendant was found guilty of theft in violation of Section 16-1(a)(1) of the Criminal Code. (Ill. Rev. Stat. 1973, ch. 38, par. 16-1(a)(1).) He was sentenced to a term of sixty days and contends on appeal that the State failed to prove the corporate identity of the owner of the property.

At trial, Kristine Swanson testified that she is a security officer for Turnstyle Family Store in Arlington Heights (hereafter Turnstyle). She observed the defendant in the automotive department of Turnstyle taking four sets of spark plugs off the rack and placing them under his shirt and pants. He then left the store without paying for the spark plugs. He was within her vision from the time he took the spark plugs until he left the store, when he was placed under arrest, and the four sets of spark plugs were recovered from him. The witness testified that she is employed by Jewel Tea Incorporated, an Illinois corporation licensed to do business in the State of Illinois.

Donald Anderson testified that he was the division security officer for Turnstyle; that he was present at the store on the date of the alleged offense but did not tell defendant "he wished he were on the case" or that "he was looking for him for quite a while."

Defendant testified that he went to Turnstyle and that he took several sets of spark plugs off the rack, which he subsequently paid for before leaving the store. He produced a receipt for \$29.36 from the Turnstyle Family Center, which he said

was for the spark plugs. He was in the parking lot of the Turnstyle store when he was placed under arrest by store employees and brought back into the store, although he told the security officer he had paid for the plugs. Subsequently, Donald Anderson, the division security manager, told him that he wished he were in on the defendant's case, and on cross-examination, defendant stated that he had the spark plugs under his shirt and pants because it is easier to carry them that way.

OPINION

The only contention on appeal is that the evidence failed to prove the corporate identity of the owner of the property. Ownership of some form of possessory interest in one other than defendant is an essential element of the offense of theft and must be alleged and proven. (People v. Thomas, 9 Ill.App.3d 384, 292 N.E.2d 153; People v. Roach, 1 Ill.App.3d 876, 275 N.E.2d 309.) Where it is alleged that the owner is a corporation, the legal existence of the corporation is a material fact which must be proven. (People v. Gordon, 5 Ill.2d 91, 125 N.E.2d 73.) However, it is a well established rule that a necessary element of proof may be supplied by defendant's own testimony. People v. Ida, 14 Ill.App.3d 407, 302 N.E.2d 713.

In the instant case, the complaint alleged defendant committed the offense of theft in that he knowingly obtained unauthorized control over spark plugs "the property of Turnstyle Family Center, A Division of Jewel Inc." In this regard, we note that defendant produced a receipt from Turnstyle and claimed that he had purchased the spark plugs from the Turnstyle Family Center store. By claiming legal title to the spark plugs through a purchase from Turnstyle, defendant admitted that they were legally the property of Turnstyle. (People v. Ruiz, 15 Ill.App.3d 11047, 305 N.E.2d 653.) In addition, both Swanson and Anderson testified that they worked in the security department of Turnstyle. Swanson also testified that she is employed by Jewel Incorporated, which

is an Illinois corporation duly licensed to do business in this state. Although there was no direct testimony that Turnstyle was a division of Jewel Inc., our review of the evidence carries us to the conclusion that ownership was alleged and proven to be in one other than defendant.

For the reasons stated, the judgment is affirmed.

Affirmed.

Publish abstract only.



59994

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY
)	
vs.)	
)	
JAMES HYMAN, JR.,	)	HON. LOUIS P. GARIPPO,
	)	Presiding.
Defendant-Appellant.)	

PER CURIAM: (FIRST DISTRICT, FIRST DIVISION)

Before Egan, P. J., Burke and Goldberg, JJ.

James Hyman, Jr., defendant, was found guilty after a jury trial of two counts of armed robbery and two counts of attempt murder. (Ill. Rev. Stat. 1971, ch. 38, pars. 8-4, 18-2.) He was sentenced to concurrent terms of 10 to 20 years on each charge. Defendant appeals arguing: that his statement was improperly admitted into evidence; the evidence was insufficient to establish his guilt beyond a reasonable doubt; and that he was prejudiced by the misconduct of the prosecutors during trial.

At trial, John Thomas, a deputy sheriff of Cook County, testified that in the early morning hours of September 2, 1972, he was attending a party at the home of his brother-in-law, Glenn Lynch. There were approximately 18 to 20 people at the party. Previously, he and Lynch had been at the Peyton Place Lounge. At approximately 6:00 A. M. there was a knock at the front door. Thomas answered the door and observed three male Negroes, one of whom was carrying a sawed-off shotgun. As Thomas attempted to close the door one of the men kicked in the door. The men then shot Thomas in the back with the shotgun. One of the men removed Thomas' gun, holster and \$31. Thomas testified that he heard one more shot and then passed out. Subsequently, Chicago police officers arrived on the scene and had him transported to Billings Hospital where he remained for 31 days. He could not identify any of the men.

Glenn Lynch, a deputy sheriff of Cook County, testified that in the early morning hours of September 2, 1972, he and his brother-in-law, John Thomas, returned to Lynch's home from the Peyton Place Lounge. There were between 17 to 20 guests in his home. At approximately 6:00 A. M. someone knocked on the front door. Thomas went to answer the door. Lynch testified that upon hearing a shot he stepped into the hallway and heard several other shots. Lynch entered a bedroom and looked toward the front of the house where he observed John Thomas lying by the front door. At that time he could also observe the barrel of a shotgun. Lynch testified that, as he jumped out of the window of the bedroom in an attempt to get behind the intruders, he was shot in the neck. The man who shot him then threatened his life if he were to move. The man took his pistol and money. Thereafter, Chicago police officers arrived. He was transported to St. Bernard's Hospital where he remained for seven days. He could not identify any of the men.

John Burge, a Chicago police investigator, testified that on September 2, 1972, at approximately 6:30 A. M., he was assigned the investigation of the case at bar. Upon his arrival at the scene, Mr. Sam Buford was present in the apartment. However, Mr. Buford's car was not found anywhere in the area. After interviewing both Lynch and Thomas in the hospital, he and his partner returned to the area to attempt to locate Buford's car which was taken in the robbery. Approximately two to three hours after the robbery, he observed Buford's car parked in a parking lot at the southwest corner of 35th and State Street, adjacent to a Chicago Housing Authority project. At that time, there was no one in the vehicle. Investigator Burge and his partner parked their squad car and maintained surveillance through high powered binoculars on the suspect vehicle.

At approximately 4:35 P. M., he observed three men approach and enter the vehicle. Investigator Burge identified the man who



opened the door to the vehicle on the driver's side as the defendant, James Hyman. The men stayed in the vehicle for approximately 30 seconds and then all three exited the vehicle. Defendant walked eastbound while the other two men walked southbound. Approximately 45 minutes later, the two men who had walked southbound came back and again approached the vehicle carrying a can of gasoline. The men removed the gas cap from the rear of the vehicle and poured the contents of the can into the gas tank. Both men then entered the vehicle and drove out of the parking lot onto 35th Street. At this time, investigator Burge followed the vehicle, turned on his flashing headlights and activated his siren. When the vehicle did not stop, investigator Burge passed the subject vehicle and cut them off and ran them into the curb. At this time, an individual seated in the right seat of the vehicle raised a revolver and pointed it at investigator Burge's car. Sergeant Gilhooly, who was seated in the rear of Burge's vehicle, fired one warning shot at the offenders. The man then dropped the gun on the floor of the car and both occupants exited the vehicle with their hands up. A Colt .38 special snub-nosed revolver, which was identified as the gun taken from Lynch in the robbery, and a brown leather type belt holster, which was identified as the one taken from Thomas in the robbery, were recovered from the floor of the vehicle. Investigator Burge testified that he subsequently obtained a warrant for the arrest of the defendant, James Hyman.

Investigator Burge testified that on December 20, 1972, he was informed that the defendant had been placed under arrest. He immediately proceeded to the lockup at 11th and State to interview him. After identifying himself as a police officer, he advised the defendant of his constitutional Miranda rights. Thereafter, defendant admitted that he had been involved in the armed robbery on September 2, 1972. Defendant was then transported to

Area 2 Robbery Headquarters. After being given his constitutional Miranda warnings a second time, defendant gave and signed a two page written statement.

Defendant's written statement was introduced into evidence. In that statement, defendant admitted that he, Eugene Williams, Vernon Washington, Narvell O'Neal and Charles Jackson were at the Peyton Place Lounge on the morning of September 2, 1972. All three, armed with a sawed-off shotgun and several pistols supplied by O'Neal, then proceeded to Lynch's home. Defendant stated that he carried a .45 caliber revolver and O'Neal carried the shotgun. In entering Lynch's apartment, a man struggled with O'Neal and O'Neal fired the shotgun. At that time some of the people in the apartment then began shooting. Defendant stated that during the incident, he fired one shot. Defendant stated that all of the men then ran from the scene and he threw the gun away.

Johnella Hyman, the defendant's mother, testified that Chicago police officers came to her home on five different occasions looking for her son. The defendant called her in September and she told him that the police were searching for him. At that time, defendant informed her that he was in Alabama. Defendant again called her in December and stated that he wanted to give himself up. She then called the police and told them that her son was in Chicago.

Defendant testified that in the middle part of August 1972, he went to Ozark, Alabama, in an attempt to stop the use of heroin. He remained in Alabama until December 1972. Near the end of September he spoke with his mother who informed him that the police had been searching for him for the commission of the robbery. Defendant stated that he returned to the city of Chicago in December 1972 and was arrested on December 19, 1972. At approximately 2:00 A. M. the following morning, he was interviewed by Chicago police investigator Burge. In talking to investigator Burge,



defendant denied any knowledge of the robbery. Defendant stated that Burge then called him a liar and showed him a written statement in which O'Neal had implicated the defendant in the robbery. Defendant testified that investigator Burge then took him to the police station at 91st and Cottage Grove. Defendant stated that he did not go voluntarily. There, defendant was again shown O'Neal's statement. Defendant stated that he was promised protection for his family and five years probation if he would make a statement. Defendant then gave a written statement based upon the facts that he had read in O'Neal's statement. Defendant denied that he had any part of the robbery or shooting on September 2, 1972.

In rebuttal, Thomas Hoban, a Chicago police officer, testified that on August 24, 1972, he was in defendant's presence for approximately two hours. Hoban testified that on August 24, 1972, he was at 3600 South State, Chicago, Illinois.

First, we consider defendant's contention that the trial court erred in failing to suppress his statement. Defendant argues that the trial judge improperly limited his motion to suppress to the question of whether or not he was given his proper Miranda warnings. Prior to trial, defendant filed a written motion to suppress his statement based upon the fact that he was not given his proper warnings pursuant to Miranda v. Arizona, 384 U. S. 436. Paragraph (d) of the motion alleged that any statement given by the defendant was the "direct result of either fear, physical or mental coercion." Prior to holding a hearing on defendant's motion to suppress, the trial judge informed defense counsel that after reading the motion, the court felt that the only specific allegation was the failure to give the proper Miranda warnings. When defense counsel referred to paragraph (d) of the motion, the trial court informed defense counsel that there were no specific facts alleged in that paragraph. The trial judge



advised defendant that if he would allege specific facts the court would require the State to go forward with the evidence on the motion. Defense counsel failed to make any specific factual allegations or modify his motion in any way. The trial judge then stated that the hearing was limited to whether or not the defendant was given his proper Miranda warnings.

Motions to suppress statements are governed by section 114-11 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 114-11) which states:

- Motion to Suppress Confession. (a) Prior to the trial of any criminal case a defendant may move to suppress as evidence any confession given by him on the ground that it was not voluntary.
- (b) The motion shall be in writing and state facts showing wherein the confession is involuntary.
- (c) If the allegations of the motion state facts which, if true, show that the confession was not voluntarily made the court shall conduct a hearing into the merits of the motion.
- (d) The burden of going forward with the evidence and the burden of proving that a confession was voluntary shall be on the State. Objection to the failure of the State to call all material witnesses on the issue of whether the confession was voluntary must be made in the trial court.

In the case at bar, defendant's motion to suppress alleged that defendant was not given his proper warnings pursuant to Miranda v. Arizona, 384 U. S. 436. There were no other specific factual allegations in the motion. Prior to a hearing on defendant's motion, the trial judge noted this and informed defense counsel that he could amend his motion to make specific factual allegations as required by statute if he wished. Defense counsel at that time failed to amend his motion in any manner. The motion to suppress as filed did not state any specific factual issues other than the failure to give the proper Miranda warnings. Therefore, the trial court properly limited the hearing of defendant's motion to suppress to the issue of whether or not defendant was given his proper Miranda warnings.



Defendant next contends that the evidence was insufficient to establish his guilt beyond a reasonable doubt. In a jury trial, credibility of witnesses is for the jury to determine and their determination will not be disturbed unless it is based upon evidence which is so unsatisfactory as to raise a reasonable doubt of defendant's guilt. People v. Riles, 10 Ill. App. 3d 772, 295 N.E.2d 234.

In the case at bar, both victims testified that they were shot and robbed while at a party on September 2, 1972. While neither victim could identify the defendant as one of the participants in the robbery and shooting, there was other evidence which demonstrated defendant's involvement in the crime. Several hours after the crime, defendant, along with two other men, was seen entering a car which had been taken in the robbery. In addition, despite the fact that defendant knew that he was wanted by the police, he did not return to the city of Chicago until December 1972. At that time he was placed under arrest and interviewed by investigator Burge. While in the lockup at 11th and State, defendant admitted to officer Burge that he had participated in the robbery. Thereafter, defendant was taken to Area 2 Robbery Headquarters where he gave a written statement in which he admitted participating in the robbery and shooting. While defendant at trial denied that he made such statements, the trier of fact need not believe a defendant's testimony. After a complete review of all of the evidence adduced at trial, we conclude that the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt.

Defendant's next contention is that the misconduct of both prosecutors was so prejudicial as to require a reversal. Defendant complains that in his opening statement the Assistant State's Attorney informed the jury that the defendant made a statement and that he believed the evidence would show that the statement

was a confession. Defendant argues that the Assistant State's Attorney's characterization of defendant's statement as a confession was conjecture and usurped the function of the jury. An examination of the record discloses that defense counsel did not object to the comment by the Assistant State's Attorney. The error therefore, if any, was waived. People v. Hairston, 10 Ill. App. 3d 678, 294 N.E.2d 748 citing People v. Linus, 48 Ill. 2d 349, 270 N.E.2d 12.

Defendant also urges that the prosecutor's direct examination of investigator Burge was improper. During direct examination investigator Burge was asked on what basis he had obtained an arrest warrant for defendant. Investigator Burge stated that he proceeded to Branch 44 with three sets of criminal complaints charging armed robbery. Defense counsel's objection was sustained and the jury was specifically instructed to disregard the answer. From an examination of the record, it is evident that the answer was volunteered by the witness, not solicited by the prosecutor. In addition, the answer was stricken and the jury was specifically instructed to disregard it. Under these circumstances, a reversal is not required. People v. Johnson, 11 Ill. App. 3d 745, 297 N.E.2d 683.

Defendant also complains that the prosecutor, during the direct examination of investigator Burge, improperly elicited testimony regarding defendant's written statement in violation of the hearsay rule. Even if hearsay testimony is improperly admitted, a reversal is not warranted where the same matter is proven by independent, properly admitted evidence. (People v. Ross, 11 Ill. App. 3d 650, 297 N.E.2d 328.) Here, the defendant's written statement to the police was subsequently admitted into evidence. Under these circumstances, the defendant was in no way prejudiced by the officer's testimony regarding that statement.

Defendant next complains that the prosecutor in his closing argument stated that defendant lied when he testified he was in

Alabama until December 1972, because officer Hoban testified he saw defendant in Chicago on August 24, 1972. Defendant urges that officer Hoban testified he saw the defendant on August 24th, but did not say where he saw him. A review of the record demonstrates that Chicago police officer Hoban testified he was in defendant's presence for approximately two hours on August 24, 1972. On direct examination, the officer was not asked where he saw the defendant. On redirect he testified that on August 24, 1972, he was at 3600 South State Street, Chicago, Illinois. While this testimony might be susceptible to different interpretations, it was a proper subject of argument by the State. In addition, defendant did not object to this comment at trial and therefore, cannot argue it for the first time on appeal. People v. Graham, 2 Ill. App. 3d 1022, 279 N.E.2d 41.

Defendant also complains that during closing arguments, the prosecutor asked the jury to compare investigator Burge and the defendant in deciding whom to believe. The defense now argues that this was a racial reference to investigator Burge, who is white, and the defendant, who is black. An examination of the closing arguments demonstrates that the prosecutor at no time referred to the race of either man. In fact, it was the defense counsel, during his subsequent closing argument, who referred to the race of each man. The State's argument in this regard was not improper.

It is a well-established rule that improper remarks by a prosecutor during closing arguments do not constitute reversible error unless they result in a substantial prejudice to the defendant. (People v. DeSavieu, 11 Ill. App. 3d 529, 297 N.E.2d 336 citing People v. Nilsson, 44 Ill. 2d 244, 255 N.E.2d 432.) The determining factor as to whether a closing argument will be held prejudicially improper, is whether there is a reasonable possibility that it might have contributed to the defendant's

conviction. (People v. Bracy, 14 Ill. App. 3d 495, 302 N.E.2d 747.) In the case at bar, after a review of the entire record, we do not believe that the defendant was substantially prejudiced by the State's closing argument.

For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

(Abstract Only).

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PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	APPEAL FROM THE
)	CIRCUIT COURT
v.	)	OF COOK COUNTY.
)	
WILLIE J. WRIGHT,	)	HONORABLE
	)	ANTHONY J. BOSCO,
	)	PRESIDING.
Defendant-Appellant.)	

PER CURIAM (First Division, First District).
Before EGAN, P.J., BURKE and GOLDBERG, JJ.

The defendant, Willie J. Wright, was convicted following a bench trial on November 21, 1972, of the offense of unlawful use of weapons in that on April 16, 1972, he knowingly carried concealed on his person a .22 caliber pistol in violation of Ill.Rev.Stat. 1971, ch. 38, sec. 24-1(a)(4). He was admitted to three years' probation on the condition that he serve the first 60 days in the House of Correction. Following a hearing on December 1, 1972, the condition of the probation was reduced to the 11 days the defendant had already served in the House of Correction. The only issue raised on appeal is whether the record shows the defendant knowingly and understandingly waived his right to trial by jury.

The record contains no written jury waiver executed by the defendant. The report of proceedings for November 21, 1972, shows the following:

"The Clerk:	Willie Wright.
"Ms. Hillyard (Assistant Public Defender):	Plea is not guilty, jury waived. We are ready for trial."

The witnesses were then sworn and the trial proceeded.

Chicago Police Officer Charles Carter testified that on April 16, 1972, he responded to a police radio report of a man with a gun in a bar. He asked the defendant, who was seated



at the bar, if he had a gun; when the defendant said he did, he pulled the defendant's coat back and saw the weapon, which was introduced in evidence. Counsel for the defendant cross-examined Officer Carter concerning whether the defendant had told him that he was a security guard.

The defendant took the stand and testified that he was employed at Atlas Security Company and Pinkerton Security. He said he stopped in the tavern and made a phone call and sat at the bar. The police came and he told them he had the weapon because he was employed as a security guard. He identified himself and showed the police his State registration.

Officer Carter was then recalled in rebuttal to testify that when he approached the defendant in the tavern, defendant had a beer in front of him and was sitting at the bar.

After the finding of guilty, the State recommended a sentence of 60 days and the assistant State's Attorney stated that the defendant had no prior convictions. The assistant Public Defender stated the defendant was fully employed by a security company, was married and supporting three children and asked for probation. Defendant was admitted to probation for three years on condition that he serve 60 days in the House of Correction.

On December 1, 1972, a hearing was held before the trial court on the defendant's motion, which he styled in the nature of a writ of coram nobis. At this hearing defendant first claimed he had not been represented at all at the trial on November 21, 1972. After some discussion, the defendant stated: "I didn't have a lawyer. I tried to get a continuance but someone appointed a Public Defender." The court then indicated it was he who had appointed the Public Defender and that the defendant was represented by competent counsel at

trial. Defendant's privately retained counsel then inquired if defendant had had a conference with the Public Defender, to which the defendant answered, "About five minutes." At this hearing a Mr. Cross stated the defendant had been employed by him for 15 years and that he had no permission to use a gun in his work as a parking attendant. The court reduced the condition of the probation to the 11 days the defendant had already served.

Usually, when an accused and his counsel appear in court and his counsel, in the accused's presence, states that a jury is waived, a knowing and understanding waiver of jury may be inferred, since the court is entitled to rely on the professional responsibility of the attorney. The leading case is People v. Sailor, 43 Ill.2d 256, 253 N.E.2d 397. The many Appellate Court cases following Sailor have been discussed exhaustively in the recent case of People v. Durham, Appellate Court, No. 58824, October 11, 1974, and we need not review them again here. In addition, the Illinois Supreme Court (Docket No. 46850) has granted leave to appeal in People v. Brodus, 19 Ill.App.3d 840, 313 N.E.2d 511, a case cited by the defendant. In Brodus, the record showed there was a period of time between the appointment of defense counsel and the time the defense counsel entered a plea of guilty and waived the defendant's right to a jury trial; the record did not show that a conference occurred between the accused and his counsel during this period of time or that during the conference counsel advised his client of his right to a jury trial. Under these circumstances, the court refused to assume that there was a conference at which the attorney informed his client of his right to a jury trial. (313 N.E. 2d 511, 513.) The case at bar is distinguishable since

defendant's testimony at the post-trial hearing disclosed that there had been a conference with his attorney and while the record does not disclose the subject matter of that conference the Sailor case permits the assumption that counsel informed the accused of his right to a trial by jury. The court said in Sailor (43 Ill.2d 256, 260-261):

"An accused ordinarily speaks and acts through his attorney, who stands in the role of agent, and defendant, by permitting her attorney, in her presence and without objection, to waive her right to a jury trial is deemed to have acquiesced in, and to be bound by, his action. [Citations.] As was observed by the court in Melero (99 Ill.App.2d at 211, 212): 'The trial court was entitled to rely on the professional responsibility of defendant's attorney that when he informed the court that his client waived a jury, it was knowingly and understandingly consented to by his client.'"

As has often been said, whether the right to a trial by jury has been knowingly and understandingly waived must be decided on the particular facts of each case and cannot be determined by any precise formula. The evidence here shows there was a five-minute conference between the accused and his attorney. The record also shows that counsel was familiar with the facts and with the defendant's theory of the case, that he lawfully possessed a weapon because of his work as a security guard. The record does not affirmatively show that counsel was appointed just prior to the trial of the case, which took place more than seven months after the arrest. While there is no written jury waiver in the record, and while defendant had no previous convictions, defendant made no contention at the post-trial hearing that he was not in fact advised of his right to a trial by jury. Rather, he there maintained that he was not represented at all and the burden was upon the defendant at that point to show that he

was deprived of his constitutional right to a trial by jury, either by affidavit or otherwise. Considering all the circumstances, we conclude on this record, that a knowing and understanding jury waiver was made by the defendant. The judgment of the circuit court of Cook County is therefore affirmed.

JUDGMENT AFFIRMED.



PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
v.	)	OF COOK COUNTY.
)	
	)	HONORABLE
LAWRENCE A. JONES,	)	WILLIAM B. KANE,
	)	PRESIDING.
Defendant-Appellant.)	

PER CURIAM (First Division, First District).

Before EGAN, P.J., BURKE and GOLDBERG, JJ.

The defendant, Lawrence A. Jones, was convicted following a bench trial of the March 6, 1973 armed robbery of Frederick Hall and was sentenced to not less than five years nor more than five years and a day in the Illinois State Penitentiary. Two grounds are raised for reversal: (1) that he was not proved guilty beyond a reasonable doubt, and (2) that the court erred in admitting into evidence his February, 1968 burglary conviction at this trial in July of 1973.

The complainant, Frederick Hall, testified that on March 6, 1973, sometime before 2:00 in the morning, he left the Boss Martin Lounge, 5430 West Madison, and traveled east to the 4400 block on Lexington, where he pulled over to the side because he had spilled some soda on the car's interior. He wiped up the spill and as he replaced the towel he used into the trunk, he saw two men with drawn pistols, about 15 feet away running towards him; one had a ski mask over his face and the other a handkerchief. He ran about 150 feet until the men caught up with him and hit him on the head with their pistol butts. He fell and as the men picked him up the hankie type mask fell from the defendant's face. He saw the defendant under the illumination of the overhead street lamps and the headlights of the car and immediately recognized him as a person he had seen five or ten times previously in the area of the 5400 block of Madison. The men walked him across the street to a vacant lot. He was able to observe the defendant's face from a

distance of about one foot while the defendant held an automatic pistol in his face and told him to take his ring and money from his pocket and throw it to the ground and then to pick it up and put it in the defendant's pocket. He did so. He thought the defendant was about 5'9" tall, 170 pounds, with a moustache. The other man left and the defendant held him in the lot for about ten minutes and did not replace his mask. When the defendant told him to lie down, he refused to lie down and the defendant told him to run and he did run southeast to Lexington and Kostner, where he stopped a motorist and told him he had been robbed. He circled the block with this motorist to see if his automobile was still there and it was not. He then stopped a patrolman, who took him to Garfield Park Hospital where he remained for an hour while five sutures were put in his head. About \$110 in cash and a watch and ring were taken from him. He went from there to Area 4 and Area 5 Homicide, where he looked at some mug shots without finding the men who robbed him and then went home. Between 5:00 and 6:00 that evening he left home and went to the west side and talked to some individuals. As a result of these conversations he later went to Area 4 Homicide after midnight on March 7 to talk to Officer Graham. From there they went to 11th and State and from there to the Boss Martin Lounge. He went in alone and recognized the defendant who was sitting in the second or third seat from the end of the bar. There were about 20 people sitting at the bar and about 100 people in the place. He then went outside and spoke to Officer Graham and another officer and pointed out the defendant.

On cross-examination, he testified he had once been convicted of a felony and had been to the penitentiary. He had been in the Boss Martin Lounge 15 or 20 minutes and "didn't believe he had anything to drink in there." Before that he had been at the home of Herman Tucker and he had nothing to drink there. He couldn't describe the wearing apparel of the robbers except that the defendant



was wearing a dark (brown, blue or black) leather jacket. He might have had on a dark skull cap covering just the top of his head. The defendant did not wear glasses and he couldn't tell if he had any scars; he did not have a beard although he had one in court. The first conversation he had with the police was with Officers Graham and Lloyd who were in plain clothes at the hospital. His head was hurting and throbbing, but otherwise he felt all right. When they later questioned him about how many men were involved he said he knew of two, whom he described. He denied telling any policeman that he stopped to empty an ashtray or that three men held him up. He did not recall if he told the police he had been drinking or that the men were 5'7" or 5'8". When asked if the man whose mask fell had short hair, he answered, "Well, I just knew the face." He used to see the defendant with someone called Big Red.

Chicago Police Officer George Graham testified that on March 6, 1973, about 2:30 or 3:00 in the morning, he was assigned to interview Mr. Hall at Garfield Park Hospital. Hall furnished him with the name which he "checked out" with the police identification section and then left with Mr. Hall for the west side to visit certain taverns where the "suspected offender" might be. Hall went inside the Boss Martin Lounge at 5400 Madison and returned shortly saying the man was sitting at the bar and pointed him out. He then took the defendant Jones outside, where Hall identified him. This tavern is 15 to 17 blocks from 4300 Lexington, where the robbery occurred. On cross-examination, when asked if Hall had been drinking that night, he said Hall indicated to him that he had been drinking but there was no "outward appearance" that Hall had been drinking. Hall said he stopped to clean up something he spilled on the seat.

There was a stipulation that if called to testify Chicago Police Officer Mescall would testify that a certain police report



was his and that it contained a certain narrative which was then read into the record as follows: On March 6, 1973, at 2:02 a.m., he arrived at 4338 West Lexington and found Hall who appeared to be injured; Hall had been drinking and gave his occupation as a truck driver; there were three offenders, a male Negro 5'8", a male Negro 5'7", a male Negro 5'6"; Hall stated he stopped the auto to empty an ashtray when two male Negroes approximately 25 years old grabbed and hit him in the head with a pistol, taking \$110 in cash and his 1973 Cadillac; "The third offender jumped behind the wheel of the auto and fled with the other two men in the victim's auto. Direction, unknown." The State emphasized that it was not stipulating to the truth or the accuracy of Officer Mescall's report.

Elizabeth Brown, the defendant's grandmother, testified that she lives with him and the defendant's sister at 139 South Central and on the evening of March 6, 1973, she was in her bedroom watching on television a hockey and a basketball playoff game. Since one game came from the west coast, she was up until 2:30 or 3:00 in the morning, and the defendant and his sister were in the front room also watching television. The defendant went to bed and she saw him the next morning. On cross-examination, she testified the living room was where the defendant slept and that the house had a front door. His sister slept in the back with her. When asked to recall what time she went to sleep on March 6, she said it would be March 7 because it was morning, way past 12:00. The defendant didn't go out the next night and he couldn't leave by the front door without a key which she had in her possession and he couldn't leave by the back door without her seeing him. The defendant's sister still lives in Chicago. When asked if the defendant was home late on the 6th and early on the 7th, she answered, "Yes" but the defendant's attorney interrupted at this point to say it was "Between 12:00 midnight and 2:00 a.m. on March 6" and she then

said, "That's right." She then testified that it was the night of March 6 and the morning of March 7. On redirect, the defendant's counsel represented that when he interviewed the witness, she had said it was the evening of March 5 and the early hours of March 6 and the witness then so testified. She testified she was 67 years of age.

The defendant, Lawrence Jones, testified that he was arrested for armed robbery in the early morning hours of March 7, 1973. After Officer Graham took him outside, Hall said, "I've seen you all day. I could have killed you." Graham asked him where the car was, he said he didn't know what they were talking about. Graham told him to shut up and when he said, "What do you mean, shut up," Graham hit him in the eye with his closed hand. He had hair down to his shoulders on March 7, but the night before he was home and had it tied up. On March 6, 1973, between midnight and two, he was at 139 South Central with his sister and grandmother. On cross-examination, he testified he used to go to the Boss Martin Lounge just about every night. He used to leave the house at 4:00 in the morning after his grandmother went to sleep. On March 6 he had a moustache. He owned a large brown hat and one of his associates was Big Red.

The defendant first contends that Hall's testimony was not credible, since Hall's testimony that he was not drinking was contradicted by Graham's testimony that Hall told him he had been drinking and by Officer Mescall's report that Hall had been drinking. Hall testified, "I don't believe so" when asked if he had anything to drink in the lounge. Subsequently, he testified, also on cross-examination:

"Q. Had you anything to drink at your home?

"A. No.

"Q. Now, in other words at the time of this occurrence you hadn't anything to drink, is that correct?

"A. I hadn't.

"Q. You were completely sober?

"A. I was."

Then, on subsequent cross-examination, when asked, "Did you ever tell any police officer that you had been drinking?" he answered, "I don't recall that either."

The statements that Hall made about not having anything to drink must be read in context with the earlier statement that he didn't believe he had anything to drink at the Boss Martin Lounge. The witness was trying to get across the point that he was "completely sober" and although Officer Graham testified Hall said he had been drinking, he also said there was no question about Hall's sobriety. Officer Graham's testimony was: "There was no outward appearance of his drinking, although he had indicated to me that he had been drinking." Graham also testified Hall did not say where he had been drinking, so it is possible that Hall may have had a drink in the Boss Martin Lounge during the 15 or 20 minutes he was there and remembered that and so stated to Officer Graham on March 6 and yet not have recalled the matter at trial some four months later on July 12, 1973. Or it may be that the officer assumed Hall had a drink from the fact that he said he had been at the Boss Martin Lounge. The discrepancy is a minor one given the overall positive testimony of Hall.

The defendant also contends that Mescall's report about three men instead of two is impeaching, but the report does not say that Hall gave this particular information and it could be that this was the officer's explanation of how the car was removed, (i.e., there "must have been" a third man), or that Hall made such a speculation, himself, or it could have been, as the trial court pointed out, information supplied by some unknown third person. Since the information could have come from sources other than Hall, it was not impeaching.

Hall's identification was positive. He had seen the defendant five or ten times, perhaps more often, on previous occasions and had no trouble identifying him in the bar or at trial. Hall had excellent opportunity to view his assailant for a ten-minute period under conditions which while not perfect were adequate. He said he was clearly able to recognize the defendant as soon as the mask fell from his face because of the illumination provided by the overhead lights, the headlights of his own car and that of passing vehicles.

The defendant's alibi evidence was weak. His grandmother had the dates wrong and even though she was rehabilitated on redirect examination by defendant's counsel serious question was raised concerning the accuracy of her testimony. She also testified defendant was home the following night which was the night he was arrested, a night he could not have been home. It was also not clear from the testimony that the defendant could not leave the house without his grandmother's knowledge. The defendant himself testified he usually left the house every night to go to Boss Martin's, but that he did not go there on March 5th or 6th.

Identification by a single witness if that witness' testimony is positive and credible, and if the witness has ample opportunity for observation is sufficient to convict. (People v. Guyton, 53 Ill.2d 114, 117-118, 290 N.E.2d 209.) The identification was not vague, doubtful, or uncertain, and the defendant was proved guilty beyond a reasonable doubt.

Defendant next contends that his February, 1968 conviction for burglary should not have been admitted for impeachment purposes, citing People v. Montgomery, 47 Ill.2d 510, 268 N.E.2d 695. In People v. Partee, 17 Ill.App.3d 166, 179-180, 308 N.E.2d 18, also a bench trial, we spoke of the diminished force of a Montgomery contention as applied to a bench trial in view of the Montgomery court's emphasis on the possible prejudice a prior conviction might cause in the minds of a lay jury, and because of the



presumption that a court will only consider competent evidence in reaching its decision. In Gordon v. United States, 383 F. 2d 936, 939, cert. denied 390 U.S. 1029, cited with approval by the court in Montgomery, the Supreme Court remarked on the tendency of a lay jury to reason, "If he did it before, he probably did it this time." While there may be unusual circumstances where, even in a bench trial, admission of a prior conviction could be considered prejudicial error, we do not believe that defendant here was prejudiced.

The defendant also contends that the burglary conviction which was five years and five months old at the time of trial was too remote. However, in People v. Ray, 54 Ill.2d 377, 297 N.E.2d 168, the court indicated that a prior conviction may not be used if more than ten years had elapsed since the defendant's release or the expiration of his parole. The comparable period here would be five months, since the defendant was placed on five years' probation for the February, 1968 burglary conviction. Consequently, the prior burglary conviction was not too remote.

Finally, the defendant contends that the burglary conviction does not directly relate to credibility. In Gordon v. United States the court stated (383 F.2d 936, 940):

"In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity. A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not;
* * * ."

Clearly, burglary is a crime which involves dishonesty. The burglary conviction was therefore properly admitted and it may be



presumed that the trial court considered it only as impeachment and not as proof that the defendant committed this crime March 6, 1973. Accordingly, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.



No. 59176

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
ROBERT E. DOBY and CHARLES E. BROWN,	)	FRANK J. WILSON,
Defendants-Appellants.	)	JUDGE PRESIDING.

Before Hayes, P.J., Leighton, and Downing, JJ.

PER CURIAM

The defendants, Robert E. Doby and Charles E. Brown, were convicted, following a bench trial, of the October 2, 1972 robbery of Edd Jones, and each was sentenced to not less than one nor more than three years imprisonment and a similar term of parole. Ill. Rev. Stat. 1971, ch. 38, par. 18-1.

At trial, the victim, Edd Jones, positively identified both defendants as being two of the five men who robbed him at about 3:00 in the morning on October 2, 1972. Although he did not know the defendants by name, the victim had seen them four or five times, before the robbery, in the same neighborhood. We have determined that no error of law appears, that an opinion would have no precedential value, and that the evidence is not so unsatisfactory as to leave a reasonable doubt of the defendants' guilt. (People v. Bennett (1973), 9 Ill. App. 3d 1021, 1025, 293 N.E.2d 687.) Accordingly, the judgment of the circuit court of Cook County is affirmed in accordance with Supreme Court Rule 23. Ill. Rev. Stat. 1973, ch. 110A, par. 23.

Judgment affirmed.

(Publish abstract only.)



No. 59556

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Respondent-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
GARTHAN LEE GLENN,	)	ROBERT A. MEIER III,
Petitioner-Appellant.	)	JUDGE PRESIDING.

Before Stamos, Leighton, and Downing, JJ.

PER CURIAM

Garthan Lee Glenn, petitioner, appeals from an order dismissing without an evidentiary hearing his amended post-conviction petition filed pursuant to the Post-Conviction Hearing Act. Ill. Rev. Stat. 1971, ch. 38, par. 122-1 et seq.

On April 20, 1971, after a pre-trial conference, petitioner entered a negotiated plea of guilty to the crime of unlawful possession of a narcotic drug as charged in five separate indictments. Petitioner was sentenced to a term of four to eight years on each charge, all sentences to run concurrently. Petitioner did not appeal. On May 16, 1972, petitioner filed a pro se post-conviction petition. Counsel was appointed to represent petitioner and on July 9, 1973, an amended post-conviction petition was filed. Upon motion of the State the amended post-conviction petition was dismissed without an evidentiary hearing.

Petitioner wished to appeal from the dismissal of his amended post-conviction petition and the Public Defender of Cook County was appointed to represent him. After examining the record, the Public Defender filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the motion has also been filed. The brief of the Public Defender states that the only possible argument which could be made on appeal is whether petitioner was entitled to an evidentiary hearing on the allegations

in his amended post-conviction petition that the trial court, in accepting his plea of guilty, failed to comply with Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch. 110A, par. 402), and that he was under the influence of drugs at the time he entered his plea of guilty. The brief concludes that an appeal on these issues would be wholly frivolous and without merit. Petitioner was mailed copies of the motion and brief on October 5, 1974. He was informed that he had until December 7, 1974 to file any additional points he might choose in support of his appeal. He has not responded.

The first possible argument which could be made on appeal is that petitioner was entitled to an evidentiary hearing on the allegations in his amended post-conviction petition that the trial court, in accepting his plea of guilty, failed to comply with Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch. 110A, par. 402). Supreme Court Rule 402 sets forth the procedure which must be followed in accepting a plea of guilty. However, the rule requires only substantial compliance with its terms (People v. Reed, 3 Ill. App. 3d 293, 278 N.E.2d 524), and the Illinois Supreme Court has indicated a realistic approach to the construction of the rule. People v. Mendoza, 48 Ill. 2d 371, 270 N.E.2d 30.

In the case at bar the transcript of petitioner's plea of guilty demonstrates that when petitioner's case was called, defense counsel informed the trial judge that petitioner wished to enter a plea of guilty to the crime of unlawful possession of a narcotic drug as charged in each of the five indictments. The trial judge advised petitioner that he was charged with unlawful possession of narcotics in each of the five indictments, and that upon a plea of guilty he would waive his right to a jury trial and there would not be a trial of any type. Petitioner was also admonished that upon a plea of guilty he would waive the right to confront the witnesses against him. Petitioner stated that he was pleading guilty

voluntarily and that no threats or coercion had been used to induce him to enter a plea of guilty. The trial judge informed petitioner of the possible statutory penalty for the crime of unlawful possession of narcotics. Petitioner stated that he understood that there had been a pre-trial conference with the court, and that upon his plea of guilty he would be sentenced to a term of four to eight years in each of the indictments, all sentences to run concurrently. The facts which provided the basis for each of the indictments were then stipulated to by the parties. Petitioner persisted in his plea of guilty which was then accepted by the trial court. After a complete review of the entire record, we conclude that these admonitions were sufficient to constitute substantial compliance with Supreme Court Rule 402.

The second possible argument which could be raised on appeal is that petitioner was entitled to an evidentiary hearing on the allegation in his amended post-conviction petition that at the time he entered his plea of guilty he was under the influence of drugs. While petitioner's amended post-conviction petition alleged that he entered his plea of guilty under the influence of drugs, this allegation was only a conclusory statement and was not supported by any properly executed affidavit. An examination of the trial record reveals that petitioner, at the time he entered the plea of guilty, answered all questions put to him by the trial court in a comprehensive and intelligent manner. There is nothing in the record to suggest that petitioner was under any disability at the time he entered his plea of guilty. Under these circumstances, this allegation is insufficient to require an evidentiary hearing. People v. Brown, 41 Ill. 2d 230, 242 N.E.2d 242.

We have examined the record and concur in the opinion of the Public Defender of Cook County that the argument thus

raised does not have substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous. Accordingly, the Public Defender of Cook County is granted leave to withdraw as counsel on appeal, and the judgment of the circuit court of Cook County is affirmed.

Motion allowed;
Judgment affirmed.

(Publish abstract only.)





Nos. 60308, 60309, 60310,
60311, and 60312

PEOPLE OF THE STATE OF ILLINOIS,)
	) APPEAL FROM THE CIRCUIT
Plaintiff-Appellant,)
	) COURT OF COOK COUNTY.
v.)
	) HONORABLE
WILLIAM WERHOLICK, PATRICK	) JAMES E. MURPHY,
MURPHY, and JACK DIXON,	) PRESIDING.
)
Defendants-Appellees.)

Before McNAMARA, P.J., DEMPSEY and MEJDA, JJ.

PER CURIAM:

This is an appeal by the State from an order entered in the circuit court of Cook County on March 4, 1974, quashing a search warrant issued at 8:42 p.m., January 9, 1974 for William Werholick and the Second Step Lounge, first floor and basement, 546 East 115th Street, on the ground that the affidavit for the search warrant did not establish the reliability of the informer who provided some of the information in the warrant. Consolidated with this appeal on the search warrant are four criminal charges all growing out of the execution of the warrant on January 10, 1974. The only issue on the appeal is whether the affidavit for the search warrant set forth facts showing probable cause and whether the facts sufficiently demonstrated to the issuing judicial officer the reliability of the informer who provided the information.

The affidavit for the warrant executed by Chicago Police Officer Thomas West stated that on January 8, 1974, he had a conversation with a "confidential and reliable informant" (hereafter "informer") who said that "during the evening" of Tuesday, January 8, 1974 he was at 546 East 115th Street at the Second Step Lounge and spoke with William Werholick, a male white employee. He asked Werholick to sell him a quarter of an ounce of heroin, and Werholick agreed, went from the bar in the lounge, entered the basement and returned with a tin foil packet. The informer then handed Werholick \$250 in cash in exchange for the packet and asked Werholick if he had additional heroin for sale;

Werholick replied he had just purchased enough heroin for the remainder of the week and the informer left, returned home and used the heroin which the informer, an addict for several years, knew was heroin from the effects. On January 9, 1974, a Wednesday, the informer again returned to the Second Step Lounge and purchased a gram of heroin for \$60 in the same manner. He told Officer West he had been purchasing heroin from Werholick the last four months and had been able to purchase heroin from him on each occasion he has met him. Officer West conducted a surveillance of the premises during the early evening hours of January 9, 1974 and observed six known narcotics addicts enter the premises and leave a short time later. Officer West also checked the Chicago Police Department records which showed Werholick had a previous criminal background "including four narcotic convictions listed I.R. Number 141678." Officer West further stated he had known the informer for longer than a year and the informer supplied him and his partner with information regarding narcotics violations in the past and "on each and every occasion narcotic contraband has been recovered." The affidavit continues: "On the last six occasions the following contrabnd (sic) has been recovered; a) 56.16 grams of heroin and 391.6 grams of marijuana, b) 12.93 grams of heroin and assorted narcotic paraphenalia (sic), c) 7.35 grams of heroin, d) 1.14 grams of heroin, e) 800 grams of heroin and 480 grams of cocaine, not yet cut for street sale, f) on the last occasion 2.5 grams of heroin were recovered."

While a search warrant may issue based upon the tip of an informer, the warrant must contain a substantial, independent basis to support the credibility of the hearsay information. (Aguilar v. Texas (1964), 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509.) In People v. McNeil (1972), 52 Ill.2d 409, 288 N.E.2d 464, the Illinois Supreme Court held that the issuing judicial officer could consider the necessity for quick action and the fact that the affidavit may be so specific that it comes close to actually

disclosing the identity of the informer. The court there dealt with recently stolen goods observed by the informer between 12:00 noon and 3:40 p.m. the date the robbery occurred. Similarly here, we have substantial purchases of narcotics occurring on Tuesday and Wednesday, and a statement by the seller that he had enough for the rest of the week. There is also independent corroboration of elements of the informer's story by the police officer observing six known addicts enter and leave shortly thereafter, and specific details provided concerning "the last six occasions" when contraband was recovered. This abundance of specific detail did practically disclose the identity of the informer and although the circumstances were not as exigent as those in McNeil, the affidavit did make a showing of some urgency. This affidavit, therefore, set forth sufficient circumstances from which the issuing judicial officer could determine that the informer was reliable. In addition, although it is not a necessary requirement, the police officer did not simply accept the informer's word but undertook a surveillance of the premises which independently corroborated the tips. The fact that a check of the Chicago Police Department records revealed Werholick had a previous criminal background involving four narcotics convictions was also a circumstance that could properly be considered by the judicial officer issuing the warrant. (Compare People v. Dillon (1970), 44 Ill.2d 482, 256 N.E.2d 451, where the fact that a policy station was allegedly in operation at a previously raided location was held properly considered.) Considering all the circumstances the affidavit was sufficient to establish probable cause and to establish the reliability of the informer. Accordingly, the judgment of the circuit court of Cook County is reversed and the cause is remanded for further proceedings.

Reversed and remanded.



60355 through 60361 (consolidated)

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25 I.A. 332

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM
Plaintiff-Appellant,)	CIRCUIT COURT
	)	COOK COUNTY
v.)	
ALBERT PACKER,)	
Defendant-Appellee.)	
<hr/>		
CITY OF CHICAGO, a municipal)	
corporation,)	
Plaintiff-Appellant,)	
)	
v.)	
ALBERT PACKER,)	
Defendant-Appellee.)	
<hr/>		
IN THE MATTER OF A SEARCH WARRANT)	
(PEOPLE OF THE STATE OF ILLINOIS),)	
Appellant,)	
)	
v.)	
ALBERT PACKER,	)	HONORABLE
Appellee.	)	JAMES E. MURPHY,
	)	Presiding.

Before McNAMARA, P.J., DEMPSEY and MEJDA, JJ.

PER CURIAM

This is an appeal by the State from an order entered in the Circuit Court of Cook County on February 26, 1974, quashing a search warrant for Albert Packer at 6052 South Michigan Avenue, Chicago, on the ground that the affidavit for the search warrant did not establish probable cause since the informant's reliability was not shown. Consolidated with this appeal are six additional criminal charges growing out of the execution of the search warrant on December 19, 1973. The only question on appeal is whether the affidavit set forth facts showing probable cause and whether the facts set forth in the warrant were sufficient to demonstrate the reliability of the informer who provided the information.



The warrant in question was issued at 8:43 P.M. on December 18, 1973, for Albert Packer, described in the warrant as "M/N 250-260" pounds, five feet seven inches, medium complexion, in the second floor apartment at 6052 South Michigan Avenue, Chicago. The warrant was based on an affidavit of Chicago Police Officer Clarence Parham which stated that some time on December 18, 1973, the affiant had a conversation with a "reliable informant" who told him he had just left Albert Packer's apartment and that while he was there Packer had sold him a \$5.00 package of marijuana and was in possession of other marijuana when he left the apartment. The informant, who had been purchasing marijuana from Packer for about two weeks, knew it was marijuana because he smoked it. The informant, whom the officer had known for a month, had provided him with narcotics information on three previous occasions, on each of which Officer Parham had made an arrest and "confiscated illegal narcotics." The three cases were "pending in Narcotics Court."

The State contends that the affidavit for search warrant in this case established the reliability of the informer. Defendant disagrees because the tip was not corroborated by the officer's own observation and because the affidavit did not state that any convictions had been obtained as a result of the informer's previous information. However, in People v. Lawrence (1971), 133 Ill.App. 2d 542,544, 273 N.E.2d 637, we said:



"Convictions, while corroborative of an informer's reliability, are not essential in establishing his reliability. Arrests, standing alone, do not establish reliability, but information that has been proved accurate does. Arrestees may not be prosecuted; if prosecuted they may not be indicted; if indicted they may not be tried; if tried they may not be convicted. If a case is tried, the informer may never testify; his credibility may never be passed upon in court. The true test of his reliability is the accuracy of his information."

It is also settled that independent corroboration of the informer's tip is not required. In People v. Ranson (1972), 4 Ill.App. 3d 953, 282 N.E. 2d 462, a police officer stated in his affidavit for search warrant that the past information provided to him by the informer resulted "in convictions and arrests pertaining to narcotics cases by me." The informer said he was that day at certain premises where two named individuals sold him heroin for \$25 and there was still heroin in the apartment under the control of those persons when he left the apartment. Following Aguilar v. Texas (1964), 378 U. S. 108, and Spinelli v. United States (1969), 393 U. S. 410, we held that the complaint adequately set forth the underlying circumstances so that the issuing magistrate was able to make an independent evaluation of the informant's conclusion that the contraband sought to be seized was "where the informant said it was," and that the informer was reliable. Considering that the informant was "recently" in the apartment, we said that the allegations, although uncorroborated, were sufficiently detailed to enable the magistrate to ascertain how the informant acquired his

information and to determine the probability that a quantity of narcotics was still in the apartment. See also People v. Portis (1972), 4 Ill.App. 3d 333, 280 N.E. 2d 712.

Although the information provided by the informer in the instant case had not yet resulted in convictions at the time the affidavit was presented to a judicial officer, on each of the three previous occasions when the informer had provided information to Officer Parham it had proved accurate and Officer Parham had confiscated narcotics and made arrests. It was not necessary that the officer independently corroborate the information in view of the informer's past reliability. The issuing judicial officer could also properly consider the necessity for quick action in this case where the informer's contact with the alleged contraband, the conversation with the police officer, the affidavit for the warrant and the issuance of the warrant all occurred on the same day. See People v. McNeil (1972), 52 Ill. 2d 409, 288 N.E. 2d 464.

The search warrant was lawfully issued, and it was error to quash the warrant and suppress the evidence seized. Accordingly, the judgment is reversed and the cause remanded for further proceedings. .

Reversed and remanded.

12/19/94
3-2-1


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 25 I.A. 333

JAMES J. RYAN,)	APPEAL FROM
)	CIRCUIT COURT,
Plaintiff-Appellant,)	COOK COUNTY.
)	
v.)	
)	
CITY OF CHICAGO, <u>et al.</u>,	)	HONORABLE
	)	EDWARD F. HEALY,
Defendants-Appellees.	)	PRESIDING.

Mr. JUSTICE JOHNSON delivered the opinion of the court:

The plaintiff, James J. Ryan, was employed as a fireman by the Chicago Fire Department holding the rank of Lieutenant First Class. On April 6, 1969, plaintiff was suspended and remained under suspension until January 16, 1971, at which time he was re-instated. During the period of plaintiff's suspension, the defendants withheld his salary. Consequently, plaintiff filed this action on September 2, 1971 to compel the defendants to pay his back salary.

The sole issue raised in this appeal is whether the trial judge was correct in ordering plaintiff's amended petition stricken and dismissed on the grounds of laches.

Laches is purely an equitable doctrine and has been called the doctrine of stale demand. Whether an action is barred on account of laches is to be determined by the facts and circumstances of each particular case. Generally, laches has been defined as such neglect or omission to assert a right, taken in conjunction with lapse of time and other circumstances causing prejudice to an adverse party as will operate as a bar in equity. (Huszagh v. Holloway (1969), 116 Ill. App. 2d 455, 252 N.E. 2d 751; Pyle v. Ferrell (1958), 12 Ill. 2d 547, 147 N.E. 2d 341; In Re Estate of O'Donnell (1956), 8 Ill. App. 2d 348, 132 N.E. 2d 74.) The facts indicate that plaintiff instituted legal proceedings approximately 9 months after he was reinstated. We do not feel that this was a significant lapse of time or that plaintiff neglected to assert a right. Furthermore, the defendants failed to

establish that they were prejudiced or injured in any way. Therefore, we hold, given the facts and circumstances of this case, that plaintiff was not guilty of laches.

The facts, which are uncontroverted, indicate that plaintiff was suspended from April 6, 1969 until January 16, 1971, a 21-month period, without written charges ever being filed. The statutory provision which prescribes the procedure to be followed in cases of Removal—Suspension—Retirement (Ill. Rev. Stat. 1969, ch. 24, par. 10-1-18), provides as follows:

"Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged, or suspended for a period of more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense."

Plaintiff had a statutory right to receive written charges inasmuch as the suspension exceeded the 30-day period set forth in the statute, and to be heard in his own defense. (People ex rel. Petlock v. McDonough (1971), 131 Ill. App. 2d 469, 268 N.E. 2d 267.) In People ex rel. Lasser v. Ramsey (1959), 23 Ill. App. 2d 100, 161 N.E. 2d 690, the court states at page 104:

"We have a procedure for removing undesirable civil servants from office, and plaintiff is fully entitled to demand his salary until it is followed."

The procedure specifically delineated in section 10-1-18 was not complied with by the defendants. The plaintiff could hardly be considered undesirable since he was promoted to the rank of captain the day of his reinstatement.

Defendants argue that the action is barred if not brought within 6 months after plaintiff's right arose and cites Dixon v. Cahill (1973), 10 Ill. App. 3d 779, 295 N.E. 2d 349. In Dixon, plaintiff filed complaint for mandamus and accounting for loss of overtime which occurred more than 17 months prior to filing com-

plaint, and for suspension which occurred about 15 months prior thereto. The court said at page 783:

"In reaching our aforementioned conclusion we are mindful that the six month rule does not apply as strictly in cases such as this one where there was no lengthy layoff or permanent discharge * * * since the city would not be required to pay twice for the same work done over a substantial period of time."

In Kelly v. Chicago Park District (1951), 409 Ill. 91, 98 N.E. 2d 738, the Supreme Court said the right to join a prayer for back salaries with a prayer for reinstatement by park employees who were improperly separated from their positions upon consolidation of the districts does not prevent them from bringing a suit for the back salaries within the period of the 5-year Statute of Limitations after their rights to reinstatement have been determined, as the cause of action for the salaries could not accrue until after determination of the right to reinstatement.

Mr. Justice Dempsey, speaking in Kadon v. Board of Fire and Police Commissioners (1964), 45 Ill. App. 2d 425, 195 N.E. 2d 751, said at pages 429-30:

"Laches is the neglect to assert a right or claim which, taken together with the lapse of time and circumstances causing prejudice to the opposite party, will bar a complaint in equity. Schoenbrod v. Rosenthal, 36 Ill App2d 112, 183 NE2d 188. There is no fixed rule as to what amounts to laches; its existence usually is determined by the facts and circumstances of each case. The question of laches is addressed to the sound discretion of the chancellor, and his decision will not be set aside unless it is so clearly wrong as to amount to an abuse of discretion. Dennis v. Hite, 28 Ill App2d 429, 172 NE2d 36; Trustees of Schools of Tp. 38 v. Chicago, 308 Ill App 391, 32 NE2d 180."

We hold plaintiff is entitled to his salary for the entire period of the suspension, after the first 30 days, in accordance with the statute.

For the foregoing reasons, the judgment of the trial court is reversed and the case is remanded for a hearing to determine

the amount due plaintiff for back salary.

Reversed and remanded.

ADESKO, P.J. and BURMAN, J., concur.

Abstract only.



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25 I.A. 363

PEOPLE OF THE STATE OF ILLINOIS)	APPEAL FROM
ex rel. ROBERT LEE DOFFORD,)	CIRCUIT COURT,
	)	COOK COUNTY.
Relator-Appellant,)	
)	
v.)	
)	
THOMAS ISRAEL, Warden,)	
Illinois State Penitentiary,)	
Menard, Illinois,	)	HONORABLE
	)	JOSEPH A. POWER,
Respondent-Appellee.	)	PRESIDING.

Mr. JUSTICE JOHNSON delivered the opinion of the court:

This is an appeal from the denial of two petitions for writ of habeas corpus. Appointed counsel has determined that there are no meritorious issues to be raised on appeal and seeks leave to withdraw as counsel pursuant to Anders v. California (1967), 386 U.S. 738, 18 L.Ed. 2d 493, 87 S.Ct. 1396.

On May 7, 1959, Robert Lee Dofford was convicted of armed robbery and sentenced to a term of 5 to 15 years. After serving 3 years and 9 months of his sentence at the Illinois State Penitentiary at Menard, he was granted a parole in March of 1963. While on parole the following year, Dofford was convicted of armed robbery in the State of Indiana and sentenced to 10 years imprisonment. After serving 6 years and 8 months in an Indiana prison, Dofford appeared before the Illinois Parole and Pardon Board and his parole was revoked.

Dofford was again paroled in 1972. A few months later he was taken into custody during an investigation of a shooting incident. A hearing was held on charges arising out of the shooting, i.e., possession of a weapon and associating with a known parolee. Thereafter, Dofford's parole was again revoked and he was incarcerated.

Based upon the foregoing facts, Dofford filed two distinct pro se petitions for habeas corpus relief. The first petition, filed August 23, 1973, alleged that the parole board was without jurisdiction to revoke his parole upon his return from Indiana



to Illinois. Dofford's second pro se petition, filed September 12, 1973, alleged that he was denied due process of law at his second parole hearing in that the revocation was based upon insufficient evidence. The public defender was appointed to represent Dofford and, after a hearing on November 13, 1973, the trial court dismissed both petitions.

On May 15, 1974, the Office of the State Appellate Defender was appointed counsel to appeal the denial of Dofford's habeas corpus petitions. On September 10, 1974, appointed counsel filed a motion in this court for leave to withdraw as counsel pursuant to Anders v. California (1967), 386 U.S. 738, 18 L.Ed. 2d 493, 87 S.Ct. 1396. The motion and brief allege that counsel has examined the habeas corpus petitions filed by Dofford and determined that relief is no longer available under the Habeas Corpus Act (Ill. Rev. Stat. 1973, ch. 65, § 1 et seq.). Counsel seeks leave to withdraw as counsel on the grounds that, in his opinion, appeal in this cause is without meritorious issues and wholly frivolous. The motion further represents that Dofford is presently on parole and counsel has been informed that he will be fully discharged from the terms and conditions thereof on September 24, 1974.

Copies of the State Appellate Defender's motion and brief were mailed to Dofford on September 9, 1974. He was advised by this court on October 2, 1974 to file any points he might choose in support of his appeal no later than November 8, 1974, after which date the court would make a full examination of all proceedings and decide whether the appeal is frivolous. No response has been received from Dofford.

After a careful review of the record, we concur in the opinion of the State Appellate Defender that there are no grounds for appeal which are not frivolous. Accordingly, the motion of

appointed counsel for leave to withdraw is allowed and the judgment of the circuit court of Cook County is affirmed.

Motion allowed.
Judgment affirmed.

ADESKO, P.J. and DIERINGER, J., concur.



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25 I.A. 366

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM
)	CIRCUIT COURT,
Plaintiff-Appellant,)	COOK COUNTY.
)	
v.)	
)	
EDWARD HOSSA, STEVEN GLINSKI,)	
and JOHN DIAZ,	)	HONORABLE
	)	EARL NEAL,
Defendants-Appellees.	)	PRESIDING.

Mr. JUSTICE JOHNSON delivered the opinion of the court:

The defendants were charged with theft of an automobile from Christiansen Chevrolet. At the hearing on defendants' motion to suppress evidence, Chicago police investigator McNally testified that he searched a garage rented to Hossa without a warrant or permission. On cross-examination the witness was asked why he was in the vicinity of the garage, and a defense objection to the question was sustained. The trial court then granted a defense motion for a directed verdict. The State appeals from the order granting the motion to suppress.

The issues on appeal are whether the trial judge erred in refusing to allow the State to present its evidence and an offer of proof at the hearing on the motion to suppress evidence.

The appellees have not filed any briefs in accordance with Supreme Court Rule 341 (Ill. Rev. Stat. 1971, ch. 110A, § 341). Where a party who prevails in the trial court does not appear or file a brief, this court may, in its discretion, determine the case on its merits or may reverse without further consideration or discussion. (People v. Spinelli (1967), 83 Ill. App. 2d 391, 227 N.E. 2d 779; People v. Nardrone (1963), 43 Ill. App. 2d 409, 193 N.E. 2d 617. See also Shinn v. County Board of School Trustees of Marion County (1970), 130 Ill. App. 2d 908, 266 N.E. 2d 123.) Because the appellees have filed no brief, we have



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decided to reverse pro forma.

The decision of the circuit court of Cook County is reversed.

Reversed.

ADESKO, P.J. and DIERINGER, J., concur.

Abstract only.



3D
25 I.A. 377

59699

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) APPEAL FROM THE CIRCUIT COURT
) OF COOK COUNTY.
vs.)
) HONORABLE CHESTER J. STRZALKA,
JEROME BROWN,) Presiding.
)
Defendant-Appellant.)

MR. JUSTICE STAMOS delivered the opinion of the court:

The defendant, Jerome Brown, was convicted, following a bench trial, of theft and of criminal damage to property belonging to one Michael McKuhn, and was sentenced to concurrent terms of nine months to the Illinois State Farm at Vandalia. (Ill. Rev. Stat. 1973, ch. 38, pars. 16-1 & 21-1.) On appeal he contends (1) the trial court committed reversible error in allowing the State to amend the dates in the complaints after all the evidence was in;¹ (2) defendant was not proven guilty beyond a reasonable doubt because of the vague and improbable identification testimony; (3) the trial court committed reversible error in admitting hearsay testimony of a police officer concerning a witness' photographic identification of the defendant the morning of the trial; and (4) the criminal damage to property conviction should be vacated, since both crimes arose out of the same conduct.

Gregory Moracki testified for the State that, between one and one-thirty in the afternoon of July 17, 1973, he was in his car which was parked, facing east on the south side of 16th Street, in front of the Transport Supply Company at 11 E. 16th Street, where he had just picked up some parts. He noticed defendant, whom he identified

1. This contention relates to the fact that, after both sides had rested, the court allowed the State to amend the complaints, first, by changing the date on the theft complaint from July 27, 1973, to July 17, 1973, and second, by inserting in the criminal damage to property complaint July 17, 1973, since no date of the offense had been contained in that complaint. It is significant to note that defendant was arrested on July 27, 1973. Additionally, at the close of the prosecution's case, defendant's motion for a directed finding was predicated upon the ground that "there is no detailed identification at all. That is the basis of the motion."



in court, some fifty to seventy-five feet away to the east attempting to break into the passenger side of a 1972 Grand Prix. This car also was facing east on the south side of 16th Street and was parked "east of the El track" at 27 E. 16th Street.² He observed defendant use a crowbar to open the passenger door and remove a tape player and two black boxes and then run across E. 16th Street and north under the El tracks. He observed defendant for two or three minutes in bright daylight. From where he sat in his vehicle, he had a side view rather than a front view of the defendant. He did not see defendant until August 9, 1973, the day of the trial. On cross-examination, he testified he did not report this incident to the police at that time, but a few days later he told what he had seen when he overheard a man at the same 11 E. 16th Street location discussing the incident. He did not remember the kind of clothes defendant was wearing. The only time he talked to a policeman was on the morning of the trial and at that time he didn't give the policeman a description of the man he saw, the witness gratuitously added that the police officer "just showed" him "some pictures." On redirect examination, defendant's objection was sustained to the prosecutor's question concerning whether he had looked at some pictures "today."

Chicago Police Officer Salvatore Cardinelli testified for the State that he had been assigned to investigate the theft in question. Over objection, he then testified that he had shown five photographs to Moracki that same morning, (i.e., the morning of the trial day), and Moracki had identified the defendant's photograph. The five photographs were admitted into evidence. Officer Cardinelli did not testify concerning any other matters.

Michael McKuhn testified for the State that when he parked his car on July 17, 1973, he had a tape player and two tape cases in the car, and, when he returned to the car later that day, these were missing and certain damage had been done to the car. McKuhn

2. The quoted phrase refers to the fact that elevated tracks cross E. 16th Street approximately in the middle of the block in which these two addresses are located. The witness' car was west of the tracks.



testified without objection that he had witnessed Moracki's photo identification of defendant earlier that same day, and part of his cross-examination related to that incident. He further stated that he had once seen defendant "in the area."

Jerome Brown testified on his own behalf that on July 27, 1973, he was at his employment, at 69th and Halsted Streets, until 3:00 in the afternoon. Thereafter he went to the City Hotel at 1601 South State Street. He denied the offense. On cross-examination, defendant was questioned as to his whereabouts on July 17, 1973. Defense counsel objected to the question on the ground that the date of the crime alleged in the complaint was July 27, 1973. The objection was overruled. Defendant stated that on July 17th, he was at the water market located at 69th and Halsted Streets, and that at 3:00 he went to the City Hotel.

Defendant's first contention is that the trial court erred in allowing the State to amend its complaints, after resting, by inserting the date of the crime on the complaint for criminal damage, and by changing the date of the crime on the complaint for theft from July 27, 1973 to July 17, 1973. Defendant contends that he was not apprised of the relevant date, and was, therefore, prejudiced and unable adequately to prepare his defense.

We initially note that the failure to specify the date in the complaint for criminal damage to property was not a substantive or fatal defect. (People v. Adams, 109 Ill.App.2d 385, 248 N.E.2d 748.) The defect was a technical one and apparent on the face of the complaint. Since defendant did not raise an objection to the complaint prior to trial, waiver precludes him from attacking its sufficiency or the propriety of its amendment. People v. Payne, 110 Ill.App.2d 114, 249 N.E.2d 240; People v. Adams, supra.

Regarding the amendment to the complaint for theft, the State asserts that the incorrect date was a formal defect subject to amendment under Ill. Rev. Stat. 1973, ch. 38, par. 111-5, and that,



since there is no evidence that defendant was prejudiced by the amendment, the court ruled properly. (People v. Bates, 9 Ill.App.3d 882, 293 N.E.2d 358; People v. Price, 132 Ill.App.2d 733, 270 N.E.2d 565; People v. Bradley, 70 Ill.App.2d 281, 217 N.E.2d 434.) Defendant, however, argues that the amendment misled and prejudiced him in that he was effectively deprived of his alibi defense.

The record reveals that the State's witnesses testified that the offense occurred on July 17, 1973, and that defendant was arrested on July 27, 1973. No objection or claim of surprise was made, and defense counsel's cross-examination related to the July 17 date. On his own behalf, defendant testified that on July 27, 1973, he was at his employment, at 69th and Halsted Streets, until 3:00 in the afternoon and thereafter went to the City Hotel. He further testified that he was arrested about four days later.³ The alibi testimony was uncorroborated. On cross-examination, he testified that on July 17, 1973, he was at the water market, located at 69th and Halsted Streets, and that at 3:00 he went to the City Hotel. Under these circumstances, we are of the opinion that defendant was neither deprived of his alibi defense nor was he materially prejudiced by the amendment of the formal defect. See People v. Fleming, 121 Ill.App.2d 97, 257 N.E.2d 271.

Defendant next contends the court committed reversible error when it allowed Officer Cardinelli to testify, over objection, that Moracki had identified the defendant earlier on the day of the trial by picking a photograph of the defendant out of a group of five. Defendant contends this evidence was prejudicial hearsay and should not have been admitted. The State, however, contends that the court improperly allowed the defendant's objection to Moracki's testimony on redirect examination that he had identified the defendant that morning from photographs, and, had it not been for this error, the subsequent error would not have occurred, since the officer's testimony would merely have been "cumulative." However, the objection was properly sustained.

3. The common law record reveals that initially defendant was in court on the present charges on July 28, 1973, the day after his arrest.

to Moracki's testimony on redirect that he had identified the defendant on a previous occasion from photographs. The defense objection to the State's belated effort on redirect to question Moracki about his photo identification was properly sustained since such redirect was beyond the scope of the cross. On cross, defense counsel had not asked anything about photos, but Moracki made a reference to photos by volunteering a statement that was not responsive to the question asked.⁴

In People v. Ford, 21 Ill.App.3d 242, 315 N.E.2d 87, a police investigator testified over objection, during a bench trial, that the complaining witness had picked the defendant's photograph from about nine photographs shown him three days after the offense. Since the complainant in Ford, like the witness Moracki here, did not testify concerning the out-of-court identification and since the identification was the only matter about which the police investigator testified (as was also the case here), the reviewing court concluded that his testimony "was obviously introduced to bolster the complainant's in-court identification of the defendant and to prove the truth of the matter asserted in his testimony." (21 Ill.App.3d at 245.) In concluding that the admission of this testimony was reversible error, despite the usual presumption in a bench trial that the court has considered only admissible evidence in reaching its conclusion, the court stated:

The circumstances under which the complainant, Mrs. Hastings, viewed her assailant were less than ideal to produce a positive identification. The utilization of hearsay evidence to bolster the identification may have given the effect of corroboration and is prejudicial and reversible error.
21 Ill.App.3d at 247.

The clear object of introducing the police testimony was to strengthen and, thus, to corroborate Moracki's in-court identification of the defendant. We conclude, therefore, that admission of this testimony was reversible and prejudicial error warranting a new trial. (People v. Ford, supra.) Under the circumstances, McKuhn's

4. It is noted that defense counsel failed to avail himself of an objection to that part of the non-responsive answer of Moracki.

testimony as to Moracki's photographic identification simply compounded the prejudicial error. In view of the trial judge's overruling of defense counsel's prior objection to Officer Cardinelli's testimony on direct examination as to Moracki's photographic identification, we do not think that defense counsel's failure to make a similar objection to McKuhn's testimony can reasonably be regarded as a waiver of the error.

For the limited purpose of determining the propriety of a remand for a new trial, we hold that the competent evidence adduced at trial is sufficient to warrant remandment. Accordingly, the judgments herein are reversed and the causes remanded for a new trial.

JUDGMENTS REVERSED AND REMANDED
FOR NEW TRIALS.

HAYES, P.J., and DOWNING, J., concur.

PUBLISH ABSTRACT ONLY.



Law said he was a heroin addict and had taken a shot between 11:00 a.m. and 12:00 noon on September 20, 1971.

Albert Gardner, an admitted heroin addict, who had taken some heroin between 5:00 a.m. and 6:00 a.m. on September 20, 1971, testified that at about 4:30 p.m. he was in the vicinity of 1359 West Roosevelt Road. He saw defendant and Wright arguing. He heard defendant speak to Wright about the dope Wright had sold him, that it was not good and he was not going to pay for it; and that Wright said he wanted the money because he gave it to defendant on credit. Defendant left and came back with a coat over his right arm. Defendant had a rifle under the coat and shot Wright. Gardner said he heard two shots, the first one when Wright fell and then defendant moved a little closer and fired another shot. Gardner said that after the shooting he went into the Spotsville and stayed there, so he did not know what happened to defendant or Wright after the shooting.

Robert Marousek, a police officer for the city of Chicago, testified that on September 20, 1971, between 4:00 p.m. and 5:00 p.m., he went to the Mother Cabrini Hospital and took statements from Lovie Brown, Melvin Ashley, and Jerry Devine. They told him they were driving northbound on Lytle approaching Taylor, when they heard a victim scream that he had been shot and they took him to the hospital.

Jerry Devine testified that about 4:30 p.m. on September 20, 1971, he was in a parked car located on the south side of Roosevelt Road in the vicinity of the Spotsville, 1359 West Roosevelt Road, Chicago. He was with Mrs. Brown and Melvin Ashley. Devine said there was a fight on the street and then a fellow came up to the car and said he had been shot. He identified the man as Ronald Wright. They took Wright to the hospital.

Defendant testified that on Sunday, September 19, 1971, he was seated on a bench in a park on Washburn Avenue, behind Art's Tavern. He had parked his automobile in the parking lot. There were incinerators, a couple of houses, a fence, playgrounds, and benches around the parking lot. While defendant was sitting there, a plain-clothes man parked his car, jumped out, and started searching everybody. Wright walked by defendant's car



and dropped a brown bag in the car and walked across the street. Defendant went to his car, took out the bag, and threw it in the incinerator because he knew Wright dealt with narcotics and defendant thought Wright had dope in the bag.

Defendant further testified that the following day he met Wright in front of the Spotsville Lounge. Wright asked defendant for the bag. Defendant told him that he had thrown it in the incinerator. Wright said the package contained \$2,000 worth of narcotics and that his life was in jeopardy if he did not bring back the merchandise or the money. Defendant said he suggested that they talk things over, but Wright went to a nearby automobile and had a conversation with some people in the car. Wright took a gun from the rear of the automobile and came toward defendant. At that time a police car passed and Wright turned his head and put down his hand holding the pistol. Defendant stated he grabbed the barrel of the gun. They started to fight and as they fell off the curb the gun "went off." Defendant broke away and ran around the corner. Defendant said he did not fire the gun and did not know Wright was shot.

Defendant gave a written statement to the police on September 24, 1971, with Leonard Kariin, his lawyer, present. The statement was substantially the same as defendant's testimony in court.

At the close of all the evidence the trial court stated that in its opinion, based upon all of the testimony and the credibility of the witnesses, and also based upon the court's observation of each of the witnesses, the State had proven defendant guilty beyond a reasonable doubt.

After a hearing in aggravation and mitigation, the trial court sentenced defendant to a term of not less than 15 years and not more than 45 years and entered judgement on the finding and sentence.

Defendant argues that his privately retained attorney was incompetent when he allegedly proceeded to trial unprepared to conduct the defense. Defendant's appellate counsel rightfully states the law to be that, where representation by counsel of defendant's choice is of such low caliber as to amount to no representation at all, or reduces the proceedings to a farce or a sham, defendant is denied the fair trial contemplated by the



due process guarantees of the Federal and State constitutions. (People v. Redmond, 50 Ill. 2d 313, 278 N. E. 2d 766; People v. Steel, 52 Ill. 2d 442, 288 N. E. 2d 355; People v. Torres, 54 Ill. 2d 384, 297 N. E. 2d 142.) In order to warrant a reversal because of incompetency of counsel, however, the defendant must establish actual incompetency as reflected by the representation and substantial prejudice resulting therefrom. People v. Witherspoon, 55 Ill. 2d 18, 302 N. E. 2d 3.

Defendant contends that his counsel was incompetent because he went to trial without having received matters which he had requested on pre-trial discovery motions. A reading of the pre-trial discussion between the trial court, the prosecutor, and defense counsel shows that prior to trial counsel had been furnished with most of the items requested in his detailed pre-trial motion for discovery. The remainder of the material sought by defense counsel was turned over to him on the morning of the trial, with the understanding that he would be allowed the necessary time to go through the material. After a recess, there was a short discussion and then the trial was recessed for lunch, thereby giving defense counsel an additional time in which to read over the material.

In People v. Gill, 54 Ill. 2d 357, 297 N. E. 2d 135, the court held that defense counsel was not incompetent because he failed to obtain a copy of the coroner's protocol until immediately prior to the coroner's testifying, saying (54 Ill. 2d, pp. 367-368):

"As we have observed, in order to warrant the reversal of a conviction on grounds of inadequacy of representation the defendant must demonstrate the actual incompetence of counsel in carrying out his duties and, in addition, it must appear that 'substantial prejudice results therefrom, without which the outcome would probably have been different.' (People v. Harper, 43 Ill. 2d 368, 374.) Considering the entire record here, even if one would assume serious deficiencies in the representation, it cannot be said that the outcome without them 'would probably have been different.' People v. Harper, 43 Ill. 2d 368, 374."

Likewise, in the case at bar the record does not show that substantial prejudice resulted to defendant by his counsel's failure to receive the various documents requested until shortly before trial or, if it did, that the outcome would probably have been different.

Defendant also argues that he was prejudiced by his privately retained



counsel's opening statement to the trial court. Defendant was tried by the court without a jury and, therefore, the court is presumed to disregard all irrelevant argument and remarks of counsel. Unless it affirmatively appears that the court was misled or improperly influenced by such remarks or that they were productive of a judgment and sentence contrary to the law and the evidence, the judgment will not be reversed. (People v. Miller, 2 Ill. App. 3d 206, 276 N. E. 2d 395.) Such is not the situation in the case at bar.

Defendant argues that in his opening statement defense counsel called defendant a liar which, defendant contends, was clearly prejudicial. The remark defendant objects to was made by defense counsel when, referring to Raymond Law and Albert Gardner, the chief witnesses for the State, counsel stated:

"MR. KARLIN: Three days later, two persons come up, who are friends of the mother. And they then say * * *. And they are not found by the police, mind you. But they bring themselves in, not at the time, but subsequently come in and they say this is what happened and so on. One of them, I know, has been in the jailhouse over here. That is why I asked for the record, to see to what extent. * * * That is where he spoke to the other witness that we have, the new witness that I just found out. * * * What kind of control, what kind of power they had over him. That is why I asked for the B of I record on this witness, so that we could know the credibility of this person, who suddenly appears several days later. And, as I say, it is not incumbent upon me, as Defense, to tell a statement, to give a statement. But in the interest of justice and in the interest of advising the State exactly of what the position is * * *. Because the State's Attorney in this room gets the material, given to him, in the same way in which a person comes in the door to me. And I can't always believe everything my people say. And I am surprised and embarrassed, and he gets them, too, when they come into his hands; doesn't know who talked to him and * * *.

MR. SCHREIER: Object. I think this is outside the scope of what the evidence will show.

THE COURT: I think this is outside the scope. Let's just confine it to what you think the evidence will show."

A careful reading of the above shows that defense counsel did not call defendant a liar. Rather, he said that the State cannot rely on the veracity of Law and Gardner. Counsel was speaking generally of other crimes and of other clients. At most, the statement was merely an error in judgment or trial strategy which will not establish incompetence.

People v. Somerville, 42 Ill. 2d 1, 10-11, 245 N. E. 2d 461.

Defendant also argues that defense counsel was not prepared to go to

trial. He criticizes counsel for telling the trial court in his opening statement that defendant "has a statement from a person who says that the main [State] witness said that he was not present" at the time of the shooting and then failing to call that witness; and that "no one can be convinced to a 'moral certainty' in this case that such a witness did not exist." However, a claim of incompetency may not be based on speculation, such as that further investigation might have revealed evidence favorable to the defendant or that greater preparedness of defense might have changed the result. People v. Thomas, 51 Ill. 2d 39, 280 N. E. 2d 433.

A reading of the record clearly shows that defense counsel's preparation and presentation in the court below was far from incompetent. Indeed, the record shows that he had assiduously prepared a difficult case and conducted cross-examination with tenacity and insight. Certainly, in the case at bar, it cannot be said that defense counsel's handling of the trial resulted in substantial prejudice to the defendant. An attorney's performance should not be measured by what defendant's present appellate counsel, with hindsight, might estimate to have been the better course. People v. Tripp, 19 Ill. App. 3d 200, 205, 311 N. E. 2d 168; People v. Washington, 41 Ill. 2d 16, 241 N. E. 2d 425.

Defendant contends that the evidence was not sufficient to support his conviction beyond a reasonable doubt. He argues that the testimony of Raymond Law and Albert Gardner, admitted heroin addicts, was "utterly unsatisfactory as a foundation for the defendant's conviction of murder." Defendant states that both witnesses were under the influence of heroin when they allegedly witnessed the defendant intentionally shoot the deceased. This statement is not sustained by the record. Law testified that he took some heroin about 11:00 a.m. or 12:00 noon on September 20, 1971, while Gardner testified that he took some heroin between 5:00 a.m. and 6:00 a.m. on September 20, 1971. The incident occurred between 4:30 p.m. and 5:00 p.m. on September 20, 1971, about five hours after Law and about twelve hours after Gardner took heroin. There is no evidence in the record that either was under the influence of narcotics at the time of the incident. Furthermore, although the testimony of a narcotics addict must be viewed with great caution, it is sufficient to sustain a conviction



if credible under the surrounding circumstances. (People v. Smith, 20 Ill. App. 3d 756, ___ N. E. 2d ___; People v. Daniels, 92 Ill. App. 2d 207, 235 N. E. 2d 305.) While it is true that habitual users of opium or other narcotics often become notorious liars and that a chronic morphine maniac is often a confirmed liar, the fact that a witness is a narcotics addict bears only upon his credibility. People v. Hudson, 106 Ill. App. 2d 130, 245 N. E. 2d 613; People v. Littlejohn, 130 Ill. App. 2d 1064, 266 N. E. 2d 358 (certiorari denied, 404 U. S. 965).

In the case at bar the State's evidence showed that on September 20, 1971, defendant and deceased had an argument because defendant would not pay for some narcotics deceased said defendant had purchased on credit. Defendant left the scene and returned a short time later with a rifle concealed under a coat he carried over his arm. He shot the deceased once, then approached closer to him and fired a second shot. On the other hand, defendant testified that deceased had a gun which was discharged when defendant attempted to take it away from him; and that he did not shoot the deceased.

In a bench trial it is for the trial court to determine the credibility of the witnesses and the weight to be given their testimony, and unless the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt, the finding of the trial court will not be disturbed. (People v. Catlett, 48 Ill. 2d 56, 268 N. E. 2d 378; People v. Arndt, 50 Ill. 2d 390, 280 N. E. 2d 230; People v. Spriggs, 20 Ill. App. 3d 804; ___ N. E. 2d ___.) On appeal, the determination of the trial judge, who had the opportunity to view the witnesses and hear their testimony, will not be lightly set aside. (People v. McNeil, 8 Ill. App. 3d 109, 289 N. E. 2d 193; People v. Enright, 1 Ill. App. 3d 654, 275 N. E. 2d 294.) Here the trial judge, who was aware of the background of the witnesses, found the testimony of the State's witnesses believable and accepted their version of the killing. In light of the record it was not error for the trial court to find that defendant was guilty beyond a reasonable doubt.

The numerous cases cited by the defendant are distinguishable from the facts in the case at bar.

There is no reversible error in the record and, therefore, the judgment of the trial court is affirmed.

Judgment affirmed.





3D
25 I.A. 380

58556

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
ROBERT BROWN,	)	HONORABLE ROBERT A. MEIER III,
	)	Presiding.
Defendant-Appellant.))	

Before Hayes, P.J., Stamos and Downing, JJ.

PER CURIAM:

Robert Brown, defendant, was charged with and found guilty after a bench trial of the crime of voluntary manslaughter in violation of Section 9-2 of the Criminal Code. (Ill. Rev. Stat. 1971, ch. 38, par. 9-2). He was sentenced to a term of two to six years. Defendant appeals, arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

At trial, William Jones, Jr. testified that in the early morning hours of September 24, 1970, he was in the Skyway Lounge located at 135 West 75th Street, Chicago, Illinois. He and Leonard Crump, the deceased, were in a washroom when the defendant, Robert Brown, came in and approached them about setting up an accident. Both men turned down the defendant's offer and defendant called them "silly fuckers." All three men left the washroom. Leonard Crump began dancing and the defendant left the lounge. Approximately ten minutes later, the defendant re-entered the lounge and informed Jones that he wanted to talk to him and Leonard Crump. Jones got Crump and together they started to walk towards the washroom, when the defendant approached them. An argument ensued during which defendant pushed Leonard Crump. Leonard Crump then pushed defendant. Defendant immediately pulled out a gun and fired two shots. Jones grabbed defendant. A bartender and another man together with Jones wrestled the defendant



to the ground and at that time defendant fired a third shot. Defendant was placed behind the bar where he was held until the police arrived. Jones testified that he then observed that Leonard Crump had been shot and was lying underneath a table. Jones testified that, on the evening in question, Leonard Crump did not possess any weapon.

Charles Moore, the owner of the Skyway Lounge, testified that on September 24, 1970, at approximately 2:45 A.M., he was tending bar, when he observed a scuffle in the rear of the lounge. Moore testified that he heard someone yell, "He has a gun." When he heard two shots fired, he jumped on top of the bar and observed the defendant holding a gun and Jones struggling with him. Moore jumped on top of both men and all three men fell to the ground. While on the ground, defendant fired a third shot. Moore testified that after the struggle, he removed a .38 snubnose revolver from the defendant's hand. He turned over the gun to the police. Defendant was held behind the bar until the police officers arrived. As the defendant was being taken across the bar, shells fell out of his pocket and were subsequently recovered by the police. Moore testified that defendant had a bruise under his eye from which blood was flowing.

Lyle Duane, a Chicago Police Officer, testified that on September 24, 1970, he was off duty and in the Skyway Lounge. At approximately 2:45 A.M., he heard a scuffle in the rear of the lounge. When he turned towards the scuffle, he observed Leonard Crump turn away from the defendant and start to run. At that time, defendant fired two shots at Crump. The bartender then got on the bar and jumped on the defendant, knocking him to the floor. While the bartender and a second man were scuffling with the defendant a third shot was fired. Defendant was placed behind the bar where Duane held him until other police officers arrived. As defendant was being placed behind the bar, he asked

Duane if he had shot anybody. Behind the bar there were bullets which had fallen out of defendant's pocket. Duane testified that he examined the .38 snubnose, six-shot revolver which was taken from the defendant and found three expended shells in the chamber.

James O'Neil, a Chicago Police Investigator, testified that on September 24, 1970, pursuant to an assignment, he and his partners, William Benkig and Leo Wilkosc, went to the Skyway Lounge. There he interviewed Officer Lyle, who stated that he was off duty in the lounge when he heard several shots fired. Lyle assisted an unidentified man in taking the defendant into custody and placing him behind the bar. Lyle stated that he did not witness the shooting itself. At the lounge defendant complained of an abrasion he had on the left side of his face.

Investigator O'Neil testified that the bullets taken from the body of the deceased were sent to the Chicago Police Crime Laboratory, but were found unsuitable for a ballistics comparison. O'Neil testified that when he examined the deceased, there were no powder burns on the body. Approximately one hour after the shooting, O'Neil examined the defendant's gun but did not detect any odor which would indicate that the gun had been recently fired.

It was stipulated that Leonard Crump came to his death as a result of a bullet wound to the head and brain. The deceased also had a second bullet wound of the buttocks. An analysis of the blood of the deceased proved negative for alcohol.

Roy Matthews testified, for the defense, that in the early morning hours of September 24, 1970, he was in the Skyway Lounge. There he observed Leonard Crump turn around and push the defendant who fell backwards. Matthews testified that he heard three shots, after which, he ducked to the floor and heard several other shots. Matthews stated that he could see the defendant, Leonard Crump, and William Jones scuffling and that the shots were not fired by any of those three men, but were fired from an area between three



to six feet beyond where the men were scuffling. Matthews testified that at the time the shots were fired, Jones was striking the defendant.

Victoria Camps testified for the defense that on September 24, 1970, at approximately 2:30 A.M., she was coming out of the washroom of the Skyway Lounge, when she observed the defendant, Leonard Crump, and William Jones arguing. She saw Crump hit the defendant in the face with a gun. Defendant fell backwards and grabbed Crump's arm. At that time, Jones began hitting the defendant. Camps testified that she then heard five or six shots. The shots did not come from any of the three men who were scuffling but from another area of the lounge.

Defendant testified that in the early morning hours of September 24, 1970, he was in the Skyway Lounge. While in the washroom of the lounge, he was approached by Leonard Crump and William Jones, who told him that they were Blackstone Rangers and wanted a payoff from him every week. Defendant refused and walked out of the washroom. Crump and Jones followed the defendant out of the washroom and one of the men grabbed defendant's arm and again demanded money. Defendant testified that he again refused and Leonard Crump hit him in the face. Defendant stated that he fell backwards and observed the gun in Leonard Crump's hand. Defendant grabbed Crump's arm and Jones began to strike him. Defendant stated that he fell to the floor and heard several shots. The bartender pulled off the men who were beating him and took him behind the bar. Defendant stated that during the incident he did not possess a weapon. Defendant denied that any shells fell from his pocket and also denied being held behind the bar by Officer Duane.

On appeal defendant contends that the evidence was insufficient to establish his guilt beyond a reasonable doubt. Defendant was convicted of the crime of voluntary manslaughter which is defined



by Section 9-2(a) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 9-2(a)) as:

"(a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

- (1) The individual killed, or
- (2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

"Serious provocation is conduct sufficient to excite an intense passion in a reasonable person."

Defendant argues that the State did not establish beyond a reasonable doubt that he was acting under a sudden and intense passion resulting from serious provocation. The sufficiency of provocation to cause a sudden and intense passion is a matter to be determined by the trier of fact. (People v. Stowers, 133 Ill. App.2d 627, 273 N.E.2d 493; People v. Hurst, 42 Ill.2d 217, 247 N.E.2d 614.) The law in Illinois is well settled that a mutual quarrel or combat is sufficient to support a finding of serious provocation. People v. Crews, 38 Ill.2d 331, 231 N.E.2d 451; People v. Hough, 102 Ill.App.2d 287, 243 N.E.2d 520.

In the case at bar, the evidence adduced at trial established that on September 24, 1970, the defendant and the deceased had an argument in a washroom at the Skyway Lounge. Thereafter, the defendant left the lounge. A short time later defendant returned to the lounge and the argument continued. During the argument, Leonard Crump pushed the defendant. Defendant and one of his witnesses testified that Crump struck the defendant in the face with a gun. Immediately after defendant was struck by Crump he pulled a gun and fired two shots at Crump. A struggle then ensued during which defendant fired a third shot. Defendant was subdued and Officer Duane held him behind the bar until other police officers arrived. During the incident, defendant received a bruise under

his left eye from which blood was flowing. This evidence was sufficient for the trier of fact to find that defendant was acting under a sudden and intense passion resulting from serious provocation. People v. Stowers, supra.

Defendant also argues that the State did not prove beyond a reasonable doubt that he performed the acts which caused Leonard Crump's death. Defendant urges that the evidence was insufficient to show that he fired the shots which killed Leonard Crump. The rule is well established that in a bench trial, it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to raise a reasonable doubt as to defendant's guilt will the findings of the trial court be disturbed. People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385; People v. Pointer, 6 Ill.App. 3d 113, 285 N.E.2d 171.

In the case at bar, William Jones and Chicago Police Officer Duane testified that they observed the defendant fire two shots at Leonard Crump. Charles Moore testified that after hearing the first two shots, he jumped up on the bar and observed the defendant holding a gun. Jones and Moore wrestled the defendant to the ground, at which time, the defendant fired a third shot. After a scuffle, Moore took a .38 caliber revolver from defendant's hand. The revolver was subsequently turned over to Chicago Police Officers and an examination of the weapon demonstrated there were three expended shells in the chamber. As the defendant was being placed behind the bar, he asked Officer Duane if he had shot anyone. Several additional gun shells fell from his pocket and were subsequently recovered by the police. Defendant puts great emphasis on the fact that there were no powder burns on the deceased and there was no odor of burnt powder in the revolver taken from him. However, these are at best, matters for the trier of fact to determine. While the defendant and two defense witnesses testified the shots were not fired by the defendant but



from elsewhere in the room, this does not establish a reasonable doubt as to defendant's guilt since the trial judge is not obliged to believe a defendant's testimony or that of his witnesses. (People v. Kaprelian, 6 Ill.App.3d 1066, 286 N.E.2d 613.) After a complete review of the entire record, we conclude that the evidence was sufficient to establish beyond a reasonable doubt that defendant fired the shots which killed Leonard Crump.

Defendant also argues that he is either guilty of murder or not guilty of any offense. Where, as in the case at bar, the record contains sufficient evidence to justify a conviction for voluntary manslaughter, the fact that the evidence could also justify the trial court in finding the defendant guilty of murder, is not a matter of which the defendant can complain. People v. Stowers, supra.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.



30
25 I.A. 409

NO. 60028

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
ANNIE RUTH HUGGIN,	)	HONORABLE
	)	JOHN M. FLAHERTY,
Defendant-Appellant.	)	PRESIDING.

BEFORE HAYES, P.J., STAMOS and LEIGHTON, JJ.

Per Curiam

The defendant, Annie Ruth Huggin, was charged with unlawful use of weapons in that on May 23, 1973, she carried concealed on her person a .22 caliber pistol. (Ill. Rev. Stat. 1973, ch. 38, par. 24-1(a)(4).) She was convicted and was sentenced to a term of three months in the House of Correction. She was also charged with theft but was acquitted during the same bench trial. (Ill. Rev. Stat. 1973, ch. 38, par. 16-1.) She appeals, contending that the trial court erred in admitting in evidence a pistol which was obtained after a "strip" search of her person at the police station. She argues: (1) Since her arrest for theft was made without probable cause and on mere suspicion, it was illegal and the search was, therefore, not incident to a lawful arrest; (2) at the time of the search she was not in custody pursuant to a lawful "custodial" arrest within the meaning of the recent U. S. Supreme Court decisions in U. S. v. Robinson (1973), 414 U. S. 219, and Gustafson v. Florida (1973), 414 U. S. 260; and (3) the fruits of the subsequent search cannot relate back to justify an otherwise illegal arrest.

On May 23, 1973, at approximately 8:30 in the evening Charles D'Urso, a patrolman for the City of Countryside, was in his police vehicle at Route 66 and Route 45, LaGrange Road, in Countryside, when he received a radio call that "a theft had occurred at Osco Drugs by one female Negro and one male Negro, or possibly Mexican." As he proceeded towards the drugstore he heard another call over the radio that the vehicle, a blue

Volkswagen van, was eastbound on Route 55. A license number was broadcast and he noted this on a pad of paper. He then rebroadcast the same information out over the Illinois State Police Emergency radio network. As soon as he had stopped transmitting that broadcast, another broadcast came over the local band from the McCook Police Department that they had the van he had described stopped at Route 66 and Joliet Avenue in McCook which is two and one half or three miles from the drugstore. Ten or twelve minutes after he received the initial radio message, he arrived there; the McCook police had two individuals outside the van and two others were exiting. One of the four was the defendant. Looking into the van through the open door on the curb side, he saw toward the rear of the van full bottles of pills and a gallon bottle. He transported the pills, the gallon bottle, the van and the four occupants of the van to the Countryside police station with the help of the McCook police. A more thorough search of the van at the station resulted in the discovery of clothing described as having been used by the persons committing the theft and a few more boxes of pills, some of which had "Osco Drugs" markings on them. The four persons found in the van were placed in a lineup; Mr. Arndt, the manager of the drugstore, and Jeffrey Dvorak, a clerk at the drugstore, identified the defendant and one male Negro (who, it developed, was a juvenile) from the lineup, although there was some confusion because of the different clothes being worn by the defendant and the juvenile. He instructed the matron to conduct a strip search of the defendant who had also been searched upon arrival at the station when she had to go to the washroom. The matron returned to tell him she found a .22 caliber Star automatic pistol on the defendant's person. Under cross-examination, Officer D'Urso admitted the radio report of the theft did not say what type of drugs had been taken and that neither the manager nor the clerk could be sure what had been taken. The van was "blue" and not gray, and it was reported over the radio as "blue" to him. At the time he escorted defendant from the van, he told her she was under arrest for "theft-suspicion of theft" and he informed her of her constitutional rights upon arrival at the station; it was about one hour later before formal charges were placed against her since, up to that point, he said she was being held "for suspicion." It was fifteen or twenty minutes after the suspects were at the station that he determined a theft had

occurred because it was then that the Osco Drug people identified the merchandise.

So far as relevant to the issues on this appeal the evidence may be summarized: Jeff Dvorak, a 19-year-old clerk at the drug store, testified that he had called the Countryside police department at about 8:30 in the evening concerning an incident and that the assistant manager also talked to the police. He had seen a juvenile crouched behind the pharmacy counter, in possession of a large plastic trash bag, and he notified the manager, who in turn asked the defendant, who had the bag at the time, to open it; the defendant refused and left the store with the juvenile. At about ten minutes to nine there was a call from the Countryside police, and he and the manager went to the police station to identify the suspects.

Wayne C. Arndt, the drugstore manager, testified that he twice asked the defendant to open the trash bag and, when she refused and left the store with the juvenile, he called the Countryside police and gave an identification of the suspects and the closest description of the van he could, the direction in which the van was heading, and that "they" had this bag with some type of merchandise from the pharmacy. He said the van was a gray Volkswagen. Without objection he testified that another customer gave him "approximately the license number" of the vehicle and he also gave this information to the police. About five minutes later he was notified by the police department to go to the police station, and he and the clerk went there and identified some drugs and identified the defendant and a juvenile in a lineup of four people.

The police matron, Barbara DeHann, testified that she made two searches of the defendant. The first time she didn't find anything. About forty-five minutes later she made another search because "someone" (she believed it might have been a narcotics agent) asked if the search had been made. This time she found a gun wrapped in a cloth bag inside the defendant's brassiere. She did not know if the defendant was charged with a crime at the time of the search.

Defendant contends that the pistol should not have been admitted in evidence because it was based upon a warrantless search of her person and not incident to a lawful arrest. A search of the person incident to a



lawful warrantless arrest is a traditional exception to the warrant requirement of the Fourth Amendment. Whether an arrest is lawful, if made without a warrant, depends upon whether the facts and circumstances known to the arresting officer justify a belief that a crime has been committed and that the defendant committed it; a police officer may act upon information acquired by him from another officer working with him or from the police radio. (People v. Buck (1968), 92 Ill. App. 2d 16, 22-23, 235 N. E. 2d 837.) Officer D'Urso testified concerning the messages he received over the radio and which he in turn rebroadcast and which were the basis upon which the defendant and the van in which she was riding were stopped. The vehicle and its occupants fitted the description which was broadcast and the vehicle was found within a few minutes of the alleged theft in an area where it was reported to have been headed only a few minutes after the call. In addition, upon arriving at the scene in McCook, Officer D'Urso observed the license plate and saw, in plain view, vials, drugs, capsules and a gallon bottle; these he quite reasonably concluded were the fruits of the drugstore theft which had been reported over the police radio. Probable cause to make an arrest may constitute something less than evidence which would result in conviction, may be founded upon evidence that would not be admissible at trial, such as hearsay, and depends upon "the factual and practical considerations of everyday life upon which reasonable and prudent men, not legal technicians, act." (People v. Buck (1968), 92 Ill. App. 2d 16, 22.) The trial judge did not think that the evidence presented to him at trial was sufficient to warrant a conviction for theft, a finding that would require proof beyond a reasonable doubt. The court's decision that probable cause existed for the arrest under the circumstances here was a correct one and not inconsistent with the theft acquittal. The facts known to the officer at the point when he took the defendant into custody justified his belief that there had been a theft at the drugstore and that the defendant committed it. The arrest was lawful and the search incident to that arrest was likewise lawful.



In United States v. Robinson (1973), 414 U. S. 219, and the companion case of Gustafson v. Florida (1973), 414 U. S. 260, the United States Supreme Court upheld thorough searches of the person following a warrantless but valid custodial arrest for an allegedly "minor" traffic offense. The court held that a lawful, valid, custodial arrest justified a thorough warrantless search of the person, rather than a limited pat-down search. The defendant here contends the defendant was not in custody but only under suspicion. In the case at bar we deal not with a minor traffic violation, but with an arrest based upon probable cause to believe that the offense of theft had been committed. There is no question that the drugstore theft the police reasonably thought had occurred and the defendant's involvement in that crime was not a "simple automobile regulatory violation." (People v. Georgev (1967), 38 Ill. 2d 165, 172, 230 N. E. 2d 851, cert. denied, 390 U. S. 998.) Nor could theft of a drugstore be considered an offense for which the law does not require a custodial arrest or one where by any practice of long standing in this community a citation or traffic ticket would have been given. See People v. Palmer (First District, Second Division: September 30, 1974), ___ Ill. App. 3d ___, ___ N. E. 2d ___, Gen. No. 57/56. Rather, a police procedure that did not result in the arrest and custodial detention of these suspects under the circumstances here would have been highly unusual. We conclude that this search of the person of the defendant was incident to a valid custodial arrest and that the pistol was, therefore, properly admitted in evidence. People v. Cannon (1974), 18 Ill. App. 3d 781, 784-785, 310 N. E. 2d 673.

Finally, defendant contends that whether the police had probable cause to arrest and, therefore, to search her depends upon the police officer's characterization of when, in his judgment, the "arrest" took place. Put differently, it is said the defendant was under suspicion only and not "under arrest" until after the pistol was discovered. A similar argument was explicitly rejected by the Supreme Court in the recent case of People v. Wiseman (September 27, 1974), ___ Ill. 2d ___, ___ N. E. 2d ___, Docket No. 46380. Officer D'Urso took the defendant into custody in McCook and then transported her to the station. We have held that when he took the defendant into custody,



the facts known to him constituted probable cause to make an arrest. When the subsequent search was made, one hour after arrival at the police station, there is no question that the defendant was in custody. The validity of the search depends upon the facts and circumstances known to the officer when he placed the defendant in his custody. But when custody occurs does not turn on the police officer's lay characterization of whether the defendant was being held "on suspicion" or his testimony about when in his judgment an "arrest" took place or upon when a formal charge was made. No formal declaration of arrest is necessary for a valid arrest to occur. See People v. Clark (1956), 9 Ill. 2d 400, 405, 137 N. E. 2d 820. Officer D'Urso had the authority to arrest the defendant and he exercised that authority when he took the defendant into custody and then to the police station. See People v. Howlett (1971), 1 Ill. App. 3d 906, 909-910, 274 N. E. 2d 885, and People v. John Warren (1974), 18 Ill. App. 3d 194, 309 N. E. 2d 626 (Abst.) At that time he had probable cause to believe the defendant had committed the crime of theft and therefore he had probable cause to arrest and search her. (People v. Wiseman, supra.) The pistol was properly admitted in evidence.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

Publish abstract only.



59885



25 I.A.^{3D} 427

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
v.)	
)	
EDWARD D. YOUNG,	)	HONORABLE
	)	BENJAMIN S. MACKOFF,
Defendant-Appellant.	)	JUDGE PRESIDING.

PER CURIAM, First District, Fifth Division,
Before BARRETT, DRUCKER and LORENZ, J.J.

Defendant was charged with the crime of theft in violation of Ill. Rev. Stat. 1971, ch. 38, par. 16-1. On June 18, 1973, he entered a negotiated plea of guilty and was sentenced to a term of two years to two years and one day. On appeal, defendant argues that the admonishments given by the trial judge prior to his acceptance of the plea of guilty were inadequate under Supreme Court Rule 402.

The record reflects that on June 18, 1973, defense counsel, in defendant's presence, informed the trial judge that pursuant to a pre-trial conference, defendant wished to withdraw his previously entered plea of not guilty and enter a plea of guilty. The trial judge informed defendant that he had a right to remain silent, a right not to incriminate himself, a right to have the State prove its case against him beyond a reasonable doubt by credible witnesses and a right to a jury trial. Defendant stated that he understood he was waiving all of those rights by entering a guilty plea. The trial judge ascertained that defendant had participated in a pre-trial conference and knew that upon a plea of guilty he would be sentenced to a term of two years to two years and one day. Furthermore, defendant stated that no promises or threats had been used to induce his plea of guilty and that he was pleading guilty because he was, in fact, guilty.

The trial judge then admonished defendant that he had an option to be sentenced under the law in effect at the time the crime was committed or under the law in effect at the time the plea was entered. Defendant was told that under the law effective at the time of the offense, he could be sentenced to a term of one to ten years. Under the Unified Code of Corrections, effective at the time of sentencing, defendant was informed that he could be sentenced to a term of one to ten years, and serve a parole of three years and be fined up to \$10,000.

Defendant then stated that he had discussed his election with his attorney and that he wished to be sentenced under the old statute.

OPINION

On appeal, defendant contends that the admonishments given by the trial court prior to accepting his plea of guilty were inadequate under Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch. 110A, par. 402). Defendant argues that he could not intelligently decide between the two sentencing alternatives because the trial judge did not advise him that under the Unified Code of Corrections his minimum sentence could not exceed one third of the maximum; that it was not mandatory for the court to impose a fine; and that under the law, a person could not be imprisoned for failure to pay a fine because of financial inability.

Supreme Court Rule 402 sets forth the procedure which must be followed in accepting a plea of guilty. However, the rule requires only a substantial compliance with its provisions. (People v. Mendoza, 48 Ill.2d 371, 270 N.E.2d 30.) In People v. Krantz and Barr, 58 Ill.2d 187, 317 N.E.2d 559, defendant Barr entered a negotiated plea of guilty to the charge of burglary. In admonishing defendant, the trial judge failed to

advise him as to the possible minimum and maximum sentence which could be imposed by law. The plea of guilty was entered only after plea negotiations and defendant was sentenced pursuant to those plea negotiations. Subsequently, defendant filed a post-conviction petition arguing that the trial court's failure to advise him as to the maximum or minimum sentences constituted a failure to comply substantially with Supreme Court Rule 402. The Supreme Court rejected defendant's contention holding that a reading of the record in a practical and realistic manner demonstrated that defendant's plea "negotiating obviously was with knowledge of the possible punishment he was trying to avoid." (58 Ill.2d 187 at 194, 317 N.E.2d 559 at 563.) The court then went on to state that Supreme Court Rule 402 did not require a detailed explanation of all the provisions of the Unified Code of Corrections:

"We make this comment because the question has arisen (e.g., see People v. Harl, 11 Ill.App.3d 372) whether substantial compliance with Rule 402(a)(2) requires also that an accused be admonished as to certain provisions of the Unified Code of Corrections (Ill. Rev. Stat. 1973, ch. 38, par. 1001-1-1 et seq.), which became effective January 1, 1973. For example, since any disposition under the Code is a 'sentence' (par. 1005-1-19), must a defendant be informed by the court concerning the possible dispositions by way of periodic imprisonment, probation, conditional discharges in cases of juvenile offenders and fines (par. 1005-5-3)? And must he be informed of the provision for mandatory parole in case of an indeterminate sentence for a felony (par. 1005-8(e))? As we have just noted, we do not consider that substantial compliance with Rule 402(a)(2) requires such admonitions. The Code was enacted subsequent to Rule 402. The rule was designed to satisfy the requirements of Boykin v. Alabama, (1969), 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709, and to give visibility to plea agreements. Committee Comments, 50 Ill.2d R. 402." 58 Ill. 2d 187 at 185, 317 N.E.2d 559 at 564.

In the case at bar, defendant entered his negotiated plea of guilty only after a pre-trial conference with the court.

Prior to entering his plea of guilty, defendant knew the exact sentence that he would receive. The record demonstrates that defendant conferred with his attorney and in open court elected to be sentenced under the law in effect at the time of the commission of the crime. Defendant's plea negotiations of necessity entailed an election under which statute to be sentenced. If defendant were sentenced using the one to three ratio provided for in the Unified Code of Corrections, the minimum possible penitentiary sentence defendant could receive would be one to three years. A practical and realistic reading of the record demonstrates that defendant's election to be sentenced under the law at the time of the commission of the crime and acceptance of the sentence of two years and two years and one day was obviously to avoid a spread in the sentence and a maximum sentence higher than two years and one day. Under these circumstances, we conclude that the admonitions given the defendant were sufficient to constitute substantial compliance with Supreme Court Rule 402 and that defendant made a clear and intelligent choice under which statute he wished to be sentenced.

We hold, therefore, that defendant's negotiated plea of guilty was voluntarily and understandingly entered, and that the judgment of the trial court should be affirmed.

JUDGMENT AFFIRMED.

PUBLISH ABSTRACT ONLY.





3D
25 I.A. 435

60196

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellant,	)	APPEAL FROM THE
	)	CIRCUIT COURT
vs.	)	OF COOK COUNTY.
)	
HERBERT MAYS, In the Matter of a	)	HONORABLE
Search Warrant,	)	JAMES E. MURPHY,
	)	PRESIDING.
Defendant-Appellee.)	

Before Hayes, P.J., Stamos and Downing, JJ.

PER CURIAM:

The defendant, Herbert Mays, was charged with possession of a controlled substance, heroin, in violation of Ill. Rev. Stat. 1971, ch. 56 1/2, par. 1402. The trial court granted the defendant's motion to quash the search warrant on the ground that there was an ambiguity in the affidavit for search warrant that made it unclear when and where the informer made the alleged purchase of heroin and, consequently, concerning what premises were to be searched.

The defendant concedes that the reliability of the informer is established, but contends that the affidavit for search warrant did not establish probable cause because it was ambiguous in that it did not connect the subject of the search with the premises to be searched. Apart from those portions dealing with the informant's reliability, the affidavit for search warrant stated substantially the following: Chicago Police Officer Dennis Banahan, the affiant, had a conversation with "a reliable informant" at 9:00 P.M. on November 5, 1972; the informant stated "that he had just left 5006 s. [sic] Michigan, 2nd flr. 1st door west of entrance, and purchased \$14.00 USC worth of a controlled substance to wit: heroin; from Herb MAYS. At that time Herb MAYS was in possession of and had under his control approximately 15 more bags of heroin"; the informant, a heroin user, stated that



when he used the controlled substance it was in fact heroin; Officer Banahan set up a surveillance at 5006 South Michigan and saw four known narcotics addicts enter and leave "said premises".

Pursuant to this affidavit, a warrant was issued by Judge Daniel J. White at 11:20 P.M. on November 5, 1972, for a search of the defendant and the second floor, first door west of entrance, 5006 South Michigan, Chicago, Illinois. At a subsequent hearing on October 10, 1973, the defendant contended that the complaint did not establish probable cause "to search the apartment that was in fact searched", since the affidavit did not state where the purchase was made, where the apartment in which the heroin was purchased was located, or that the place sought to be searched was Mays' residence. When the court granted the motion, it stated: "There are three different ways you can read that. One is that he just left there after purchasing it, one, that he purchased it after he left, and secondly, that he purchased it one door west of 5006 South Michigan".

In People v. Saiken (1971), 49 Ill. 2d 504, 511, 275 N.E. 2d 381, the Illinois Supreme Court said that reviewing courts will more readily accept the judicial determination of a magistrate that probable cause exists and will uphold a warrant issued by a judicial officer "on evidence of a less persuasive character than would have justified an officer acting on his own determination and without a warrant", stating:

"Because of the preference for informed and deliberate determinations of magistrates over perhaps hurried actions of officers in making searches incidental to arrests, the affidavits are to be tested in a common sense and realistic manner and with great deference to the magistrate's determination of probable cause." (Citations omitted)

And in People v. Bak (1970), 45 Ill. 2d 140, 258 N.E. 2d 341, and People v. Mitchell (1970), 45 Ill. 2d 148, 258 N.E.



2d 345, cert. den. in both cases, 400 U.S. 882, the Supreme Court held that a defendant has no right to controvert the matters declared under oath which occasioned the finding of probable cause and the issuance of the search warrant. (A different procedure, of course, applies to proceedings to suppress evidence resulting from a warrantless search. See People v. Williams (1973), 16 Ill. App. 3d 440, 442-443, 306 N.E. 2d 678.) While influenced by the need for protecting and preserving the identity of informants, our Supreme Court also noted that a contrary holding would "result in one judicial officer originally evaluating the credibility of the affiant and another reassessing it in the later motion to suppress", and it explicitly disapproved of "successive or split evaluations by different judicial officers of the credibility of the affiant and others originally offering evidence" and declined to adopt a rule it believed "would unnecessarily permit a collateral and distracting evidentiary dispute". 45 Ill. 2d 140, 145-147. The court emphasized that the credibility of the affiant is for the judicial officer before whom evidence is presented under oath and if he "finds the evidence worthy of belief and sufficient to form probable cause, this judicial determination cannot be relitigated through a later disputing of the evidence". 45 Ill. 2d 140, 144.

A corollary of the rule announced in People v. Bak and People v. Mitchell would seem to be that the issuing judicial officer may be expected, in accordance with sound legal practice, to have read both the warrant and the accompanying affidavit before issuing the warrant. It may further be inferred that the issuing judicial officer would have clarified at least such claimed ambiguities as are the subject of the dispute in this case. Given the haste with which warrants are often executed and the excited atmosphere under which they must often be prepared and the often

remarked-upon proposition that ordinary policemen are not and should not be required to be legal draftsmen when they prepare warrants, the presumption should be that the issuing judicial officer did use his common sense and his knowledge of legal procedure in evaluating whether probable cause was shown. Rather than stretching the imagination to construe an affidavit as faulty, as was done by the trial court here, ambiguities should be resolved in a way that takes into account that a judicial officer has reviewed the matter. If the trial court could spot the ambiguities claimed here, it may be presumed that the issuing judicial officer did so also, and, further, that he would not have issued the warrant had he not resolved these ambiguities in favor of the State.

The claimed ambiguity here is that the informant could have purchased the heroin one door west of 5006 South Michigan. This interpretation is without solid foundation in the record and borders on impeaching, if it does not actually impeach, the credibility of the affiant, a practice forbidden by People v. Bak and People v. Mitchell, *supra*. To put the matter somewhat differently, it can be assumed that the judicial officer who issued the warrant satisfied himself of the meaning of these claimed ambiguities and, as this was a matter of credibility, it may not now be relitigated under the doctrine announced in Bak and Mitchell.

The warrant, in any case, is not ambiguous. Only one address, 5006 South Michigan, is mentioned either in the warrant or in the affidavit. There was no evidence presented, nor is there any reason to believe, that the warrant did not particularly describe the place to be searched. Compare People v. Curry (1972), 56 Ill. 2d 162, 306 N.E. 2d 292. Defendant points out that the affidavit does not specifically state when the officer's observations took place, but it may reasonably be inferred from the facts as narrated in the complaint that the police officer's observations



occurred sometime after 9:00 o'clock on the evening of November 5, 1972, when he received the information from the informant, and sometime before 11:20 P.M., when the judge issued the warrant. The warrant does not have to issue immediately upon the officer's learning of the information or his corroboration of it. For example, in People v. Williams (1967), 36 Ill. 2d 505, 508, 224 N.E. 2d 225, cert. den. 389 U.S. 828, the officer's corroborating observations occurred on March 17, 1964; the informants witnessed dice games on March 31, April 8, 12, 13, and 15, 1964; and the search warrant was executed on April 19, 1964. There is no requirement that the warrant be issued or executed immediately upon the receipt of the information of the informant or the affiant's subsequent corroboration, if any, unless the delay is "so unreasonable as to vitiate the showing of probable cause". People v. Hawthorne (1970), 45 Ill. 2d 176, 179, 258 N.E. 2d 319, cert. den. 400 U.S. 878. Such is not the case here.

It is clear to us that the affiant thought the contraband described by the informant was in the apartment he described in the warrant and for which a warrant was in fact issued. The phrase "west of the entrance" may be read to mean west of the entrance to the second floor and not west of 5006 South Michigan. It is likely that the phrase "first door west of entrance" was intended further to particularize the location of the defendant's apartment. Perhaps the officer saw the four known addicts enter that address but did not see them enter the defendant's apartment, as defendant contends, but the fact that they entered the same address is still corroboration of the reliability of the informer even if it would not constitute proof of guilt beyond a reasonable doubt.

Moreover, the issuing judicial officer could consider the apparent necessity for quick action. At 9:00 P.M. the informant told the police officer he had purchased a bag of heroin



and that the defendant had fifteen bags left. Since the officer subsequently saw four known narcotic addicts enter these premises and presumably purchase heroin, there was a necessity for haste before the defendant sold all the heroin he had. Yet, rather than execute a search without a warrant, he took the time and went to the trouble of executing an affidavit for a warrant. The magistrate could properly consider the need for quick action. People v. McNeil (1972), 52 Ill. 2d 409, 288 N.E. 2d 464. Considering all the circumstances, the affidavit was sufficiently accurate on a common sense reading, to indicate with particularity the premises described, and it established probable cause. The court erred in quashing the warrant. Accordingly, the judgment of the circuit court of Cook County is reversed and the cause is remanded for further proceedings.

JUDGMENT REVERSED AND CAUSE REMANDED.

12-31-74
And Don
20 pm



25 I.A. ^{3D} 480

58503

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
vs.)	
	)	HON. ARTHUR L. DUNNE
OLLIE MAE APPLEWHITE,	)	Presiding
)	
Defendant-Appellant.)	

PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Before Burke, P.J., Goldberg and Egan, JJ.

Ollie Mae Applewhite, defendant, was found guilty after a bench trial of the crime of voluntary manslaughter. (Ill. Rev. Stat. 1971, ch. 38, par. 9-2.) She was sentenced to a term of one to ten years. Defendant appeals, arguing that the evidence was insufficient to establish her guilt beyond a reasonable doubt and that her sentence is excessive and should be reduced to a term of probation.

At trial, Bessie Harris testified she was the mother of Martha Pooler. On January 14, 1972, at approximately 8:00 P.M., she was in the basement of her building at 6439 South Parnell Avenue, Chicago, Illinois, when she heard a gun shot. She ran upstairs and observed her daughter fall dead at the door to their apartment.

Raymond Latimer, a Chicago police investigator, testified that on January 14, 1972, he was assigned the investigation of the death of Martha Pooler. On January 16, 1972, defendant accompanied by her attorney surrendered herself to Area 3 Homicide Headquarters. Defendant was pregnant at that time and did not appear to have any injuries. At that time defendant gave him a 9-shot .22 caliber revolver. It was stipulated that the weapon which defendant surrendered to the police was the weapon which caused the death of Martha Pooler.

Robert Wilson testified that on January 14, 1972, he resided in a second floor apartment at 6439 South Parnell Avenue,

Chicago, Illinois. Martha Pooler and Bessie Harris resided in an apartment on the first floor, while defendant, her husband and five children resided in a second floor apartment. At approximately 7:30 P.M. defendant came to Wilson's apartment. After a short conversation, defendant left and went into her own apartment. Wilson testified that shortly thereafter he heard Martha Pooler banging on the wall. Defendant came out of her apartment and told Wilson that she was going to tell Martha Pooler that her children were not making noise but that she was cleaning the apartment. Defendant proceeded downstairs, returning five or six minutes later. At that time, defendant told Wilson that Martha Pooler pushed her in the face. Defendant stated that she was going to go back downstairs and tell Pooler to give her the rent money so that she could move. Defendant again went down to the first floor. A few moments later defendant ran back upstairs with a gun in her hand and said "I shot that bitch." In response to questioning by Wilson, defendant stated that she had shot Pooler in the arm. Wilson testified that he ran downstairs and observed Martha Pooler lying on the floor. He went back upstairs and phoned the police.

Defendant testified that on January 14, 1972, she was six months pregnant and resided in a second floor apartment at 6439 South Parnell Avenue, Chicago. She returned home from work at approximately 8:00 P.M. and began cleaning her apartment. After approximately five minutes, she heard Martha Pooler pounding on the radiator. Defendant testified that she went downstairs to tell Pooler that she was cleaning her apartment. Pooler informed defendant that she was tired of her and wanted her to move. Defendant stated that she went back to her apartment. Defendant testified that she then realized that she did not have any milk for her baby and started to go to the store. As she was leaving the building, Pooler came to the door and again told her to move. Defendant asked Pooler to return her rent money. Pooler refused, again ordering her to move. An argument ensued

during which Pooler pushed defendant, who fell back against the radiator. Defendant testified that Pooler then attempted to kick her. When Pooler put her hand inside her coat, defendant pulled out a gun and shot Pooler. Defendant stated that she had been carrying the gun in her coat pocket all day. Defendant testified that she knew Pooler had a gun but had never seen her with a gun. Defendant denied that in her first meeting with Pooler there was any physical contact and denied telling Wilson that Pooler had pushed her in the face. Defendant also denied saying to Wilson "I shot that bitch."

In rebuttal, Chicago Police Investigator Latimer testified that in conducting the investigation into the death of Martha Pooler, he examined the clothing worn by the victim at the time she died. His investigation did not reveal the presence of any weapon.

It was stipulated that Martha Pooler came to her death as a result of the bullet wound of the chest. A toxicologist examination of the blood of Martha Pooler revealed the presence of 173.0 mg. percent ethanol.

Defendant's first contention is that the evidence was insufficient to establish her guilt beyond a reasonable doubt. Defendant was convicted of the crime of voluntary manslaughter which is defined by section 9-2(a) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 9-2(a)):

"(a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

- (1) The individual killed, or
- (2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person."

The offense of voluntary manslaughter is a legal compromise between murder and exoneration recognizing human weakness of an intense passion caused by serious provocation. People v. Johnson, 4 Ill. App. 3d 249, 280 N.E.2d 764.

The sufficiency of provocation to cause a sudden and intense passion is a matter to be determined by the trier of fact. (People v. Stowers, 133 Ill. App. 2d 627, 273 N.E.2d 493; People v. Hurst, 42 Ill. 2d 217, 247 N.E.2d 614.) The law in Illinois is well settled that a mutual quarrel or combat is sufficient to support a finding of serious provocation. People v. Crews, 38 Ill. 2d 331, 231 N.E.2d 451; People v. Hough, 102 Ill. App. 2d 287, 243 N.E.2d 520.

In the case at bar, the evidence demonstrated that on January 14, 1972, defendant and Martha Pooler had an argument during which defendant shot and killed Pooler. The testimony of Robert Wilson established that defendant went down to speak with Pooler after Pooler, upon hearing noise from defendant's apartment, began knocking on the radiator. Defendant came back upstairs several minutes later and told Wilson that Pooler had pushed her in the face and ordered her to move out of the building. A short time later, defendant went back downstairs and the argument continued. Defendant ran upstairs to Wilson's apartment and told him "I shot that bitch." In response to questioning by Wilson, defendant stated that after Pooler had pushed her in the face, she shot Pooler. According to defendant's testimony, the deceased pushed her down against the radiator and attempted to kick her. There was no evidence introduced that the deceased possessed a weapon of any type. Under these circumstances, the trial judge acting as trier of fact had ample evidence from which to conclude that defendant was provoked by a physical attack and was under a sudden and intense passion resulting from serious provocation by the deceased. People v. Jenkins, 10 Ill. App. 3d 995, 295 N.E.2d 587.

Defendant argues that the evidence demonstrated she was acting in self-defense. Whether a killing is justified under the law of self-defense is always a question of fact. (People v. Meeks, 11 Ill. App. 3d 973, 297 N.E.2d 705.) Here, the only evidence which in any manner indicates self-defense was the trial testimony of the defendant. However, a trial judge is not obliged to believe a defendant's testimony. (People v. Kaprelian, 6 Ill. App. 3d 1066, 286 N.E.2d 613.) The trial judge obviously believed the State's version of the shooting and after a careful review of the entire record, we cannot say that that version is so unreasonable or unsatisfactory as to create a reasonable doubt as to defendant's guilt.

Defendant's second contention is that her sentence is excessive and should be reduced to a term of probation. The granting of probation rests within the discretion of the trial court and the trial court's determination is subject to review only to the extent of ascertaining whether the trial court did in fact exercise discretion and whether it acted in an arbitrary manner. People v. Saiken, 49 Ill. 2d 504, 275 N.E.2d 381; People v. Vincson, 15 Ill. App. 3d 934, 305 N.E.2d 671.

In People ex rel. Ward v. Moran, 54 Ill. 2d 552, 556, 301 N.E.2d 300, 302, the Illinois Supreme Court reviewed the authority of appellate courts to reduce a penitentiary sentence to probation under Supreme Court Rule 615. (Ill. Rev. Stat. 1971, ch. 110A, par. 615.) The court held:

"After review of this court's decisions and consideration of the statutory authority entrusted to the trial court, we hold that our Supreme Court Rule 615 was not intended to grant a court of review the authority to reduce a penitentiary sentence to probation."

In the case at bar, the trial judge, prior to sentencing, had a pre-sentence report prepared by the probation department, and held an extensive hearing in aggravation and mitigation. In

imposing sentence the trial judge stated that he had given the defendant's sentence a great deal of thought. Considering the facts adduced at trial and during the hearing in aggravation and mitigation, we do not believe the trial court acted in an arbitrary manner in denying defendant's application for probation.

Accordingly, the judgment is affirmed.

JUDGMENT AFFIRMED

CHICAGO BAR
MAR 17 1975
ASSOCIATION

25 I.A. 506^{3D}

MANNIE CONEY,)
))
Plaintiff-Appellant,)
))
vs.)
))
NELLIE L. GRAHAM and VIRGIE R.)
WHITMORE,)
))
Defendants-Appellees.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

HON. JOSEPH M. WOSIK,
Presiding

Before Burke, P.J., Goldberg and Egan, JJ.

For clarity, Nellie L. Graham will be designated as co-defendant and Virgie R. Whitmore will be designated defendant.

The record discloses that 49th Street, at Forrestville Avenue, is a one-way eastbound street and Forrestville Avenue is a two-way street.

Plaintiff called the co-defendant as an adverse witness under section 60 of the Civil Practice Act. Co-defendant testified that she was driving slowly at about five miles an hour in an easterly direction on the left side of 49th Street; that there was a car ahead of her going about five miles an hour; and that as she approached Forrestville Avenue, she noticed defendant's car going north on Forrestville. Co-defendant said that when she was already in the intersection, defendant was going north on Forrestville and approaching the intersection; and that she went to apply her brakes but her foot got caught in the carpet of the car and she hit the gas instead. Co-defendant said the front of her car hit the left rear side of defendant's automobile; that both cars went over to the northeast corner of 49th and Forrestville; that her car came to rest on the parkway; and that defendant's car ended up on the corner, in the street on Forrestville Avenue. Co-defendant stated that after the accident she saw plaintiff underneath defendant's car.

Defendant was also called as a witness under section 60 of the Civil Practice Act. She testified that on April 6, 1969, she was going north on Forrestville Avenue, looking for a parking space; that there were no cars ahead of her; and that no cars were coming in the opposite direction on Forrestville Avenue. Defendant said that as she approached 49th Street, she did not notice whether it was a one-way street or a two-way street, but she looked both ways and did not see any traffic; that she did not see any eastbound car clearing the intersection ahead of co-defendant's car; that she did not know how fast co-defendant's car was traveling at the time of the impact; and that after the accident, she got out of her car and inspected the damage to it, but did not inspect the damage to co-defendant's car. Defendant said that she never saw plaintiff until after the accident, when he was lying on the sidewalk; and that plaintiff was not underneath her car.

Rochelle Graham, a daughter of the co-defendant, who was riding as a passenger in her mother's car, testified that at the time of the occurrence she was 14 years of age. She said her mother was going east when her car collided with another car in the intersection of 49th Street and Forrestville Avenue; that when her mother's car had reached the intersection the other car was about a half a block down Forrestville Avenue; that her mother was barely moving at the time, only going about 10 miles an hour, while the other car was going 15 to 20 miles an hour; that defendant's car never changed its speed as it approached the intersection. Rochelle further testified that there was a collision between the two cars, and that after the cars came to rest, she saw plaintiff in front of defendant's car.

On cross-examination Rochelle testified that as her mother was proceeding east, Rochelle was in the passenger seat on the right side of the street and that cars were parked to Rochelle's right along the curb. Rochelle said she did not have any trouble seeing down Forrestville Avenue, even though there were cars parked at the curb.

Rochelle also said that at the time she saw defendant's car a half block away, her mother's car was at the corner, about to cross into the intersection; and that when her mother tried to stop the car, something happened to her foot and the car went faster. Rochelle further stated that when she first saw the defendant's car, her mother's car was stopped at the corner; that after her mother stopped, Rochelle did not look to her right and did not see defendant's car, so that she does not know where defendant's car was at the time her mother started up again.

At the close of plaintiff's case, defendant filed a motion for a directed verdict. The trial court, after reviewing the evidence in great detail, sustained the motion of defendant.

Both parties rely upon Pedrick v. Peoria & Eastern R. R. Co., 37 Ill. 2d 494, 229 N.E.2d 504, where the court said:

"In our judgment verdicts ought to be directed and judgments n.o.v. entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513, 514.

Plaintiff contends that under the Pedrick case the trial court erred in directing a verdict for defendant because it did not consider that defendant failed to keep a proper lookout for other vehicles moving on the highway; that defendant failed to yield the right of way to another motor vehicle in the intersection; that defendant failed to keep a proper lookout for plaintiff after the initial collision and did not attempt to avoid striking him as he was standing on the sidewalk.

Plaintiff argues that defendant failed to keep a proper lookout because, although 49th Street is a one-way eastbound street, defendant mistook it for a two-way street, and as she was approaching the intersection, she looked to her left and then looked to her right, away from the direction where the co-defendant's car would have been coming; and that if she had not looked away, she would have seen co-defendant's car.

Defendant argues that plaintiff's contentions have no application to the facts in the case at bar. The facts disclose that co-defendant was driving on the left side of 49th Street, which is an eastbound one-way street; that the front of co-defendant's car hit the left rear side of defendant's car; and that, therefore, defendant's car was practically through the intersection before her car was struck by co-defendant's car. Co-defendant testified that when she saw defendant's car, she "went to apply" her brakes but her "foot got caught in the carpet of the car" and hit the gas instead of the brakes. Further, co-defendant's car came to rest in the parkway at the northeast corner of 49th Street and Forrestville Avenue, where

plaintiff was standing, while defendant's car "ended up on the corner" in the street on Forrestville Avenue.

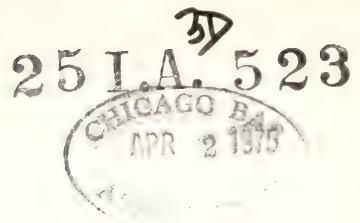
Defendant also argues that the question of whether defendant was negligent when she first looked to the left and then to the right as she approached 49th Street, an eastbound one-way street, is immaterial because defendant's car was coming from co-defendant's right, going to defendant's left and, therefore, defendant had the directional right of way. (Ill. Rev. Stat. 1969, ch. 95 1/2, par. 165.) Further, the evidence is uncontradicted that co-defendant's car hit defendant's car because co-defendant hit the gas pedal instead of brake. It is therefore apparent that plaintiff's injury resulted from co-defendant's negligence and that defendant was free of negligence.

Although co-defendant stated that after the accident she saw plaintiff underneath defendant's car, defendant said that after the accident plaintiff was lying on the sidewalk and not underneath her car. Rochelle Graham, daughter of co-defendant, testified that after the accident she saw plaintiff in front of defendant's car. The physical evidence shows that co-defendant's car came to rest in the parkway at the northeast corner of 49th Street and Forrestville Avenue while defendant's car ended up on the corner, in the street on Forrestville Avenue. This indicates it was the co-defendant's and not the defendant's car that hit the plaintiff.

In the case at bar, the trial court reviewed all of the evidence in its aspect most favorable to plaintiff and concluded that it was the negligence of the co-defendant which resulted in the injuries to plaintiff, and that the evidence so overwhelmingly favored defendant that no contrary verdict based on the evidence could ever stand. The trial court did not err in directing a judgment for defendant.

The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED



59751

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit Court
	)	of Cook County.
ROBERT G. EDMONDS a/k/a JOSEPH EVANS,)	
	)	Philip Romiti, J.
Defendant-Appellant.)	

BEFORE MCGLOON, P.J., and McNamara and Dempsey, JJ.

PER CURIAM:

The defendant, Robert Edmonds, was convicted, following a jury trial of the robbery of Beverly Stewart and sentenced to not less than five nor more than fifteen years in the Illinois State Penitentiary. Ill.Rev.Stat., 1971, ch. 38, par. 18-1. On appeal he contends: (1) the trial court committed reversible error when it allowed into evidence testimony by a police officer that the victim identified the defendant at the scene of the crime as the man who robbed her; (2) the prosecutor's references to the fact that the State's evidence was "undenied" and "uncontradicted" denied him a fair trial.

The victim, 20 years old, testified that in the early morning hours of August 25, 1972, she left her home at 4452 King Drive, Chicago, to go to an all-night grocery store at 47th and King Drive. She was walking south in the 4500 block of King Drive when the defendant walked up behind her, put his arm around her neck and told her he wanted money. She felt a sharp object at her neck but couldn't see what it was. He took her into an alley that runs parallel to King Drive. They walked through the alley and entered a backyard at 4544 South King Drive, where the defendant took her purse containing \$11 or \$12, emptied it and put the money

in his pocket. He said he would shoot her if she screamed. She was crying and he struck her in the side of the head and kept saying he would kill her if she did not shut up. She was only a foot away from him and could see his face clearly. He took her arm and they stepped down into the garage and he started to unbutton her blouse. She heard the police and saw lights in the alley and ran out of the garage into the backyard and then into the alley and told the police "the guy" was in the garage. She saw the police go up in the garage where the defendant was, heard an officer tell the man to stop running, saw the defendant trying to get over the fence, heard a shot and saw the defendant lying on the ground. The police asked her to identify the defendant and she testified, without objection, that as he lay on the ground she did identify him as the man who had robbed her and attempted to take her clothes off.

Evelyn Lee testified that she lived in the first floor apartment at 4544 King Drive. Behind her apartment building is an old garage and an open area between the garage and the apartment building. On August 25, 1972, about 12:30 in the morning, from the window of the back sun porch she saw a man with his back to her standing in the yard directly in front of the garage door. She couldn't see his hands, just a light blue or white shirt and something glittering. She could hear a woman's voice but couldn't see her too clearly. The woman was standing below the step that leads into the garage and the woman said, "Please don't hurt me," or "Please don't hit me." The man kept saying, "I'm going to kill you; shut up; I don't want to hear it and that's all." He gave the woman a little push back in the garage. The witness left her house and saw a squad

car come down 46th Street and turn up the alley and she ran to the alley to show the policemen which garage it was. She explained to the policemen that there was only one way out of the garage. The girl ran out of the garage and the policemen told the man to come out. She saw one policeman step in the yard and heard a jingling noise like someone was trying to climb over the fence, heard a policeman say, "Stop or I will shoot" and heard one shot. She saw the man that was shot and the shirt he was wearing which was light blue. On cross-examination she testified the color of the shirt worn by the man who was shot "looked exactly the same" as that worn by the man she saw from the sun porch. She had never seen the defendant before.

Officer Philip Kulak testified that on August 25, 1972, about 12:30 A.M., he proceeded to an alley at the rear of 4544 King Drive and saw Evelyn Lee. He also saw the victim, who was wearing a scarf around her head with her blouse open, running out of a garage and screaming. He stopped her and went to the garage. From the next lot over, to the north of the garage, a distance of some twenty feet, he saw the defendant run out of the garage door and try unsuccessfully to climb the metal fence. He told the defendant to stop. As the defendant ran through a passageway of the house that led to King Drive, he again told him to stop and when he did not, he fired one shot striking him in the right buttock. The defendant ran a few more steps, then fell down in the corner. The officer was asked if he saw Miss Stewart near where the defendant was lying and when he answered "Yes" he was asked, "Did she do anything when she was near this location?" and he answered, without objection, "She stated that he was the man." On cross-examination he testified that he searched the defendant and the area and found no weapon. On redirect, he was again asked if Miss Stewart pointed

at the defendant and he answered "Yes," again without objection.

During closing argument, the assistant State's Attorney stated, "Just keep in mind that the State's case was uncontradicted and undenied." The defendant objected, but, while the court did not rule explicitly on the objection, he told counsel, "You can proceed with your argument." Attempting to meet this statement, defendant's counsel said during his argument: [The prosecutor] "says that the State's evidence is undenied. By pleading not guilty Bob Edmonds denies these charges." The assistant then said, "Judge, the evidence was undenied". The court told defense counsel to proceed and he then argued that the plea of not guilty was "a denial." In final rebuttal, an assistant State's Attorney, after twice saying it was "uncontradicted and undenied" that the defendant was running out of the garage door, finally stated toward the close of his argument: "And the fact that he is caught there and the fact that he is running away, the fact that she identifies him, and the fact of what he is wearing is all uncontradicted and undenied." The court sustained the defendant's objection to this remark.

The defendant first contends that Officer Kulak's testimony that the victim identified him at the scene as the man who robbed her was inadmissible because it was hearsay, that is that it was an out-of-court statement offered for the truth of the matters contained in the statement. No objection to the officer's testimony was made in the trial court. Miss Stewart had already testified without objection that she identified the defendant at the scene. Since she was under oath and in court and subject to cross-examination, the fundamental basis for rejecting hearsay testimony, lack of opportunity for cross-examination was absent. See People v. Carpenter

(1963), 28 Ill.2d 116, 121, 190 N.E.2d 738. Even if the officer's testimony concerning her identification were to be considered hearsay, the error would be harmless because of the positive identification and other corroborating circumstances present. Cf. People v. Canale (1972), 52 Ill.2d 107, 114-115, 285 N.E.2d 133.

The closing argument did not violate the defendant's right to remain silent. In People v. Stanbeary (1970), 126 Ill. App.2d 244, 254-255, 261 N.E.2d 765, similar statements made by the prosecutor were upheld. See, also, People v. Mills (1968), 40 Ill.2d 4, 237 N.E.2d 697; People v. Skorusa (1973), 55 Ill.2d 577, 584-585, 304 N.E.2d 630. Any error was harmless, in any event, given the overwhelming evidence of the defendant's guilt in this case.

The judgment is affirmed.

Affirmed.

No. 60210

612 NORTH MICHIGAN AVENUE BUILDING)	
CORP., an Illinois corporation,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
vs.	)	COOK COUNTY.
)	
FACTSYSTEM, INC., a Delaware)	
corporation,)	
)	
Defendant,)	
)	
and	)	HONORABLE
	)	CHARLES R. BARRETT,
JEFFERSON STATE BANK, etc., and BERNARD	)	PRESIDING.
FEINBERG,)	
)	
Defendants-Appellants.)	

Mr. PRESIDING JUSTICE McGLOON delivered the opinion of the court:

Plaintiff appellee, 612 North Michigan Avenue Building Corporation, was awarded a judgment against defendants appellants Jefferson State Bank and Bernard Feinberg in the sum of \$38,835.02 by the circuit court of Cook County as a sanction under Supreme Court Rule 219(c) for appellants' noncompliance with the rules of discovery. The trial court also struck appellants' answer, denied appellants' motion to vacate the judgment, and sustained plaintiff's motion to strike appellants' supplemental petition. Appellants appeal from these orders, claiming that the trial court's actions were contrary to Supreme Court Rule 219(c) and constituted an abuse of discretion.

We affirm in part, reverse in part, and remand with directions.

The facts in this case may be summarized as follows. Plaintiff brought this action against defendant Factsystem, Inc. for nonpayment of rent under written leases. Plaintiff's complaint alleged that defendants Bernard Feinberg and Jefferson State Bank were liable for the rent by reason of their relationships with Factsystem. In their answer, Feinberg and the Bank denied liability. Discovery began on November 18, 1971 with an order for

all three defendants to produce specific documents. All the documents were not produced, and on September 28, 1971 the court entered an order granting plaintiff's petition for the establishment of specific dates for the inspection of documents specified in the discovery order. On December 27, 1972, plaintiff petitioned the court for sanctions under Supreme Court Rule 219(c) inasmuch as all the items requested and ordered had not been produced. The matter was continued until January 15, 1973, at which time the court struck Factsystem's answer and entered judgment against it as a Rule 219(c) sanction. Factsystem has not appealed from this ruling. The court refused to enter a sanction against Feinberg and the Bank at that time, preferring to order compliance with the discovery order within ten days and the filing of affidavits of compliance by the remaining defendants. The cause was placed on the status call and was continued a number of times until September 20, 1973. At that time, the plaintiff informed the court of its intention to file written interrogatories and the court instructed the defendants that strict compliance with the Rules would be required. The interrogatories were served on October 17 and filed with the court the next day. Supreme Court Rule 213 provides that interrogatories must either be answered or objected to within twenty-eight days of service, but defendants failed to respond in accordance with the rule. On the twenty-ninth day, November 16, 1973, plaintiff served a notice of motion upon defendants' attorneys and on November 20, the thirty-third day, plaintiff presented to the court a petition for Rule 219(c) sanctions against Feinberg and the Bank because they failed to respond to the interrogatories within the time allowed by Rule 213. The court granted plaintiff's motion, and on the next day signed an order which struck defendants' answer and entered judgment against Feinberg and the Bank. Later that day, November 21, defendants presented to the court a petition to stay entry of order which the court allowed to stand as a motion to vacate the judgment order. At the same time, after entry of the judgment, defen-

dants presented unsigned draft answers to all but two of the twenty-eight interrogatories. Plaintiff responded to defendants' motion. Almost a month after the draft answers were presented, on December 17, defendants filed their completed answers to interrogatories without leave of court. On December 26 the court heard argument of counsel on defendants' motion to vacate the judgment order of November 21, 1973. After listening to arguments and reviewing the history of the case, the trial court stated to defendants in open court:

"*** it may seem harsh, and you may believe it to be an abuse of discretion, but I have studied this file, and if ever the rules of discovery have been fractured, they certainly have been in this case. Now, the rules are made to be followed. If a litigant chooses to exercise his right under those rules, I think it is the Court's job to enforce them, and on that basis I am going to deny your petition."

Appellants' first contention on appeal is that the court's actions constituted an abuse of judicial discretion under the facts of the case. It is argued that the answers to interrogatories were only five days late when the court entered the judgment order of November 21, that the trial court had not entered an order compelling the answers to interrogatories; that all the answers to interrogatories were actually filed prior to the December 26 denial of defendants' motion to vacate the prior judgment and appellants conclude that the sanctions employed were too severe and constituted an abuse of judicial discretion.

Illinois Supreme Court Rule 219(c) provides that:

"If a party *** unreasonably refuses to comply with any provisions of Rules 201 through 218, or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:

* * *

- (v) that, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party ***; or

- (vi) that any portion of his pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue."

Sanction orders under Rule 219(c) are to be imposed only, from the language of the rule, when the noncompliance is unreasonable and the order entered is just. (Serpe v. Yellow Cab Co. (1973) 10 Ill.App.3d 1, 293 N.E.2d 742.) We first consider the question of whether the defendants' noncompliance with the discovery rules was unreasonable. The standard in such cases is whether "the conduct of the offending party seems to have been characterized by a deliberate and pronounced disregard for the rule or order not complied with", (Serpe, supra, at 5) or whether "the actions of the party show a deliberate contumacious or unwarranted disregard of the court's authority." (Schwartz v. Moats (1971) 3 Ill.App.3d 596, 599, 277 N.E.2d 529.) In the instant case, the defendants failed to respond fully to the court's prior discovery orders concerning the production of specified documents and the filing of an affidavit of compliance upon completion of the acts ordered by the court. Furthermore, the defendants failed to respond to the interrogatories within the time allowed by rule after the court specifically cautioned and warned them to comply with the rule. Although defendants argue that the answers to the interrogatories were only five days late on November 21, that the court had not entered an order requiring the answers to the interrogatories, and that a sanction should not be entered for such a minor violation, we feel the trial court acted within its sound discretion in utilizing such a sanction. Rule 219(c) does not require a court to enter an order requiring a party to file answers to interrogatories prior to the court's imposition of a sanction upon the reluctant party. The defendants' five day delay in presenting answers to the interrogatories may not in itself constitute a deliberate disregard of the court's authority, but taken in conjunction with the defendants' refusal to deliver certain specified documents over a two year period is sufficient to

show a pronounced disregard of the court's rules, orders, and authority, and an unreasonable noncompliance with the rules of discovery.

Having determined that the noncompliance was unreasonable, we turn to the issue of whether the order was just. In light of the facts and circumstances of this case, we feel the order entered was just because there are sufficient indications that defendants were attempting to delay the trial as much as possible, and would have continued to thwart discovery unless sanctions were entered.

Notwithstanding the propriety of the November 21st order, defendants appellants argue that the December 26th denial of their motion to vacate the earlier judgment order was error. Defendants point out that they had filed their answer to interrogatories in the interim period subsequent to the judgment order and prior to the hearing on December 26, arguing that the case could have proceeded to trial and the only purpose for the court's refusal to vacate the judgment order was to inflict a punishment upon the remaining defendants.

The entry of a default judgment as a sanction under Rule 219(c) should be employed as a last resort in order to enforce the rules of discovery, yet should be set aside when a trial on the merits may be had without hardship or prejudice. (Gillespie v. Norfolk & W. Ry. Co. (1968) 103 Ill.App.2d 449, 243 N.E.2d 27.) Two cases demonstrate this rule. In Gillespie, the court ruled that the filing of answers to interrogatories after the entry of a sanction for failure to file the answers was sufficient to warrant vacatur of the sanction order of dismissal where the evidence showed a willingness to comply with the rules of discovery. Similarly, in Gray v. Yellow Cab Co. (1971) 1 Ill.App.3d 984, 273 N.E.2d 703, this court held that the filing of answers to interrogatories after the entry of a sanction order of dismissal was sufficient to warrant reversal where the opposing party was not

prejudiced by the delay in filing, where the answers contained no information unknown to the opposing party, and the facts indicated a reasonable excuse for the delay.

The facts in the instant case are distinguishable. The record shows that appellants had engaged in a program of deliberate defiance of the court's authority and the rules of discovery by attempting to stall all significant discovery for over two years. When defendants decided to comply with the discovery rules and orders, it did so only after the entry of the sanction order of November 21. We see no valid reason why the answers could not have been filed in a timely fashion. It is apparent that defendants presented their answers to interrogatories at the last possible moment, hoping to delay the proceedings even further by asking the court to reconsider its earlier order. Under these facts, the deliberate nature of defendants' noncompliance coupled with the unwarranted delay of trial to the plaintiff's prejudice indicate that the trial court did not abuse its discretion in refusing to vacate its prior sanction order under Rule 219(c).

Appellants' second contention on appeal is that the trial court erred by not acting in conformance with the rule in People ex rel. General Motors Corp. v. Bua (1967) 37 Ill.2d 180, 226 N.E.2d 6, which has been incorporated in Supreme Court Rule 219(c), supra. The rule in Bua is that pleadings may be stricken for the violation of a discovery order or rule "only when the stricken pleadings bear some reasonable relationship to the information withheld." (37 Ill.2d at 197.) Appellants claim that the interrogatories for which the sanctions were imposed related solely to the relationship between the three defendants, and were in no way related to the issue of liability or damages. It is submitted that the sanction of striking the defendants' answer and entering judgment on all issues far exceeded the proper sanctions under the rule. Plaintiff appellee's position is that the information sought

in the discovery orders and the interrogatories related to the plaintiff's entire case and therefore judgment on all issues was proper.

We feel the trial court acted properly in striking defendants appellants' answer as a sanction for failure to comply with the rules of discovery. The information withheld from discovery bore a reasonable relationship to the substantive merits of the defendants' defense, and such a sanction is appropriate under Rule 219(c).

When the answer was stricken, the trial court proceeded as if there were no answer on file, and entered a judgment by default against defendants appellants. The sanction of entering such a judgment was approved by the court in Schwartz v. Moats, supra, and we believe the trial court in the instant case acted correctly in proceeding to a judgment by default. Our concern, however, is that defendants appellants should be given the opportunity to have a trial on the amount of the damages because the default was concerned only with the issue of liability and not with the amount of the damages. (People ex rel. General Motors Corp. v. Bua, supra.) The defaulted defendants have the right to be heard solely on the issue of damages. Smith v. Dunaway (1966) 77 Ill.App.2d 1, 6, 221 N.E.2d 665, 667.

The judgment of the circuit court of Cook County is affirmed as to the issue of liability, reversed as to the issue of damages, and the cause is remanded to the trial court for a hearing on the issue of damages.

Affirmed in part; reversed in part;
and remanded with directions.

Dempsey and Mejda, JJ., concur.



60013

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit
	)	Court of Cook County.
WILBUR JACKSON,)	
)	
Defendant-Appellant.)	)	Honorable Mark E. Jones,
		Presiding.

BEFORE MCGLOON, PJ., MEJDA and DEMPSEY, JJ.

PER CURIAM:

Following a bench trial held on April 10, 1973, the defendant was convicted of unlawful use of weapons and failure to register as a firearm owner both offenses stemming from his possession on February 28, 1973, of a .32 caliber Smith and Wesson revolver. Ill.Rev.Stat. 1973, ch. 38, par. 24-1(a)(4) & 83-2. He was sentenced to forty days on each charge. The only issue on appeal is whether the record shows the defendant knowingly and understandingly waived his right to a trial by jury.

When the case was called the following proceedings occurred:

"THE CLERK: Mr. Sheriff, Wilbur Jackson, Officer Lewis.

MR. MOTTA: Defense is ready for trial. There will be a plea of not guilty, and they wish to be tried by this Court.

THE COURT: Very well.

Swear the witnesses.

(Witnesses duly sworn.)

MR. MOTTA: I'm going to make a motion to suppress the evidence, Judge.

THE COURT: Proceed."

Chicago Police Officer Fred Clark was then called by the defendant and he testified that on February 28, 1973, he saw a vehicle driving northbound on Michigan Avenue with no rear tail-lights making an illegal right turn. He pulled the car over and the driver of the vehicle could not produce a license. While his partner spoke with the driver of the vehicle, Officer Clark observed the defendant put something under the front seat and a subsequent search of the car revealed a .32 caliber revolver underneath and towards the back of the seat. The motion to suppress was denied, and the weapon admitted into evidence. The defendant testified on his own behalf that the police first searched the car and found nothing and then searched the car again and found the weapon. Everybody denied it was "their gun." He swore at the officer who then said, "You're a smart one, ain't you. We're going to put the gun on you." He denied the gun was his or that he was asked for a registration card and said he didn't even know the gun was in the car. The defendant's father also testified that he had never seen the gun around the apartment nor had he seen a weapon in the house. Officer Clark testified in rebuttal that he did not charge the defendant with the gun because he was swearing at him.

Recently, in People v. Mitchell (1974), 21 Ill.App.3d 171, 315 N.E.2d 101, we stated the familiar propositions of law governing whether or not a jury waiver has been knowingly and understandingly made. We stated that the question must be decided upon the particular facts of each case, that it cannot be determined by any precise formula and that the trial court cannot perfunctorily discharge its duty to see that the waiver is expressly and understandingly made. While recognizing that generally, under People v. Sailor (1969),

43 Ill.2d 256, 253 N.E.2d 397, an accused whose counsel waives a jury in his presence will be presumed to have consented to his attorney's action, we held a jury waiver invalid because the record did not affirmatively show "a meaningful opportunity for defendant to consult with his attorney." Even more recently in People v. Durham (1974), 111.App.3d , N.E.2d [No. 58824], the Appellate Court reviewed at length the decision in People v. Sailor, and the many Appellate Court decisions since Sailor. We also note that leave to appeal has been granted in People v. Brodus (1974), 19 Ill.App.3d 840, 315 N.E.2d 511, a case in which this court refused to assume that there was a conference at which the attorney informed his client of his right to a jury trial and found it "readily apparent" that defense counsel had been appointed "moments before defendant went to trial."

In the present case, the record does not affirmatively show that there was a pause in the proceedings at which a conference was held, but in People v. McClinton (1972), 4 Ill.App.3d 253,255 280 N.E.2d 795, the court specifically rejected the argument that the Sailor case would require, "as a condition precedent to a valid jury waiver," that the record affirmatively reflect that defendant and appointed counsel were afforded an opportunity for consultation. Furthermore, unlike Brodus the record here does not show counsel was appointed only minutes before trial.

In People v. Morgan (1974), 18 Ill.App.3d 153, 309 N.E.2d 331, cited by the State, the assistant Public Defender in language virtually identical to that used here stated, "The plea is not guilty and we wish to be tried by this court." The Morgan court held that Sailor was applicable. In People v. Gay (1972), 4 Ill.

App.3d 652, 281 N.E.2d 738, a jury waiver was upheld partly on the basis that the defendant was no newcomer to criminal proceedings and that his lawyer displayed a thorough familiarity with the facts and personal life of the defendant which must have come from long acquaintance or from a rather extended conference.

In this case the defendant was previously convicted of theft which had been reduced from armed robbery. He was, therefore, no stranger to criminal proceedings. He was not tried until more than one month after the date of the offense and the case was continued several times. While defendant's counsel here did not show as thorough a familiarity with defendant and his background as did counsel in Gay, defendant's counsel moved to suppress the weapon and adequately presented his client's version of the facts.

This case, like Gay, was tried in the Municipal Department, Criminal Division of the Circuit Court of Cook County. These courts, as we said in Gay, are "almost invariably confronted with overcrowded calls," and consequently, it is especially necessary that the trial judges in these courts be able to depend upon the professional responsibility of the members of the bar appearing before them that their clients have consented to waive jury. Considering all the circumstances, we have concluded that the jury waiver here was knowingly and intelligently and understandingly made. Accordingly, the judgment of the Circuit Court of Cook County is affirmed.

Affirmed.

APR 2 1975

60116

PEOPLE OF THE STATE OF ILLINOIS,))
)
 Plaintiff-Appellee,))
)
 v.)
)
 JULIUS JAMES,)
)
 Defendant-Appellant.)

APPEAL FROM
 CIRCUIT COURT
 COOK COUNTY

HONORABLE
 JRWIN COHEN,
 Presiding.

Before McNAMARA, J., DEMPSEY, MEJDA, JJ.

PER CURIAM.

Julius James, defendant, was charged with the offense of theft in that he took unauthorized control of a 1967 Cadillac valued at more than \$150, in violation of section 16-1(a)(1) of the Criminal Code (Ill.Rev.Stat. 1971, ch. 38, par. 16-1(a)(1)). Following pretrial negotiations, defendant entered a plea of guilty to a reduced charge of theft of property of the value of less than \$150, and was sentenced to probation for two years, with the condition that he make restitution of \$800 to be paid to the complaining witness through the Probation Department. Defendant appeals. The sole issue on appeal is whether the trial court, in fixing the amount of restitution, complied with the provisions of section 1005-6-3 (b)(10) of the Criminal Code.

When the case was called for trial the Public Defender was appointed to represent defendant. Following a recess he advised the court that in accordance with a pretrial consultation defendant would plead guilty to the charge of misdemeanor theft. After defendant was admonished a finding of guilty was

entered on his plea. The Assistant State's Attorney recommended a two-year misdemeanor probation with restitution of \$802. The trial court interrogated defendant as to his ability to pay that sum at the rate of \$50 a month, then sentenced defendant to two years' probation on condition that he pay \$800 restitution at the rate of \$50 a month.

Defendant argues that the trial court did not comply with the provisions of section 1005-6-3(b) (10) of the Criminal Code (Ill.Rev.Stat. 1973, ch. 38, par. 1005-6-3). He concedes that he pleaded guilty to a charge of theft of a 1967 Cadillac automobile, but contends that it was error for the trial court to fix restitution of \$800 as a condition of probation because no evidence was introduced to substantiate the determination that the automobile was in fact worth \$800. Section 1005-6-3 provides in part:

"(b) The Court may in addition to other conditions require that the person:

* * *

(10) make restitution or reparation in an amount not to exceed actual loss or damage to property and pecuniary loss. The court shall determine the amount and conditions of payment."

In this court defendant quotes certain amounts from the National Automobile Dealers Association "Blue Book" for the wholesale value of 1967 Cadillac automobiles. However, they are not part of the record and will not be considered. People v. Wiggins (1973), 9 Ill.App. 3d 1078, 293 N.E.2d 696; People v. Neukom (1959), 16 Ill. 2d 340; 158 N.E.2d 53.

Defendant relies on People v. Holzapple (1956), 9 Ill.2d 22, 136 N.E.2d 793, wherein the defendant was placed on probation and ordered to pay \$239 in restitution for "feloniously taking personal property in the amount of \$77." Upon revocation of probation for failure to make restitution and for conviction of subsequent crimes, defendant was sentenced to a term of one year to life. He appealed, contending that the condition of restitution was an invalid award and that the judgment of probation was therefore invalid. After observing that the record did not show the circumstances under which the amount was determined, the court held that, assuming an excessive award, such would not void the order of probation.

The State relies upon People v. Stacy (1965), 64 Ill. App. 2d 157, 212 N.E. 2d 286, where defendant was granted probation on condition that he pay \$100 per month as a contribution toward the complainant's medical expenses for the entire five-year term of probation. In sustaining the order the court stated at page 160:

"The defendant argues that the \$100 monthly payments were not based on evidence of the complainant's actual medical expenses. The amount suggested by O'Neill's attorney was not questioned by the defendant or his attorney at the time the condition was imposed. The record reveals that the two attorneys had conferred before the suggestion was made to the court and the reasonable deduction is that they agreed to the figure proposed. Moreover, the reasonableness of the total of these payments, \$6,000, is not questioned in this court and, in view of the very serious injuries sustained by the complaining witness, there seems no doubt that the ordered payments were not excessive."

In the instant case there was no evidence fixing the value of the automobile. Following a pretrial conference between the attorneys and the negotiation of the guilty plea, the trial court, upon motion of the State, ordered that the complaint be amended by changing the value of the property stated therein to "less than \$150." However, this was done only after the agreement of the parties to the lesser charge. The plea of guilty to the lesser charge does not necessarily mean that defendant was not guilty of the theft of property of a value of more than \$150, as originally charged. Following the conference and plea of guilty, the Assistant State's Attorney stated "Recommend two years' misdemeanor probation with \$802 restitution." Neither defendant nor his counsel made any objection to the statement or to the finding of the court. Defendant, after being personally interrogated by the court, agreed that the \$800 restitution would be paid at \$50 a month through the Probation Department. While no evidence was introduced as to the actual loss, the court determined the amount and conditions of payment upon the pretrial negotiations and agreement and by direct interrogation of defendant. Defendant has not alleged nor contended that the amount or payments were not in accordance with the pretrial agreement. He has had the benefit of a reduced charge pursuant to that agreement and should not now be permitted to complain that the amount of restitution may be excessive.

The judgment is affirmed.

Affirmed.

APR 8 1975

60506-60507

IN THE MATTER OF A SEARCH WARRANT,)	APPEAL FROM
(PEOPLE OF THE STATE OF ILLINOIS),)	CIRCUIT COURT
)	COOK COUNTY
Appellant,)	
)	
v.)	
)	
LARRY MACON,)	
Appellee.)	
)	
PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellant,)	
)	
v.)	
)	
LARRY MACON,)	HONORABLE
Defendant-Appellee.)	JAMES E. MURPHY,
	Presiding.

Before McNAMARA, J., DEMPSEY, J., and MEJDA, J.

PER CURIAM.

The State, pursuant to Supreme Court Rule 604(a)(1) (Ill.Rev.Stat. 1973, ch. 110A, par.604(a)(1)), appeals from an order of the circuit court of Cook County quashing a search warrant and suppressing evidence. The search warrant was originally issued on February 13, 1974 to search defendant Larry Macon and certain premises for marijuana. The defendant has filed no brief as required by the rules of this court. While we can reverse pro forma on this basis, we choose to deal with the merits of the case. The State argues on appeal that the affidavit for search warrant was sufficient to supply probable cause for the issuance of the warrant and that the trial judge erred in granting the motion to quash the warrant and suppress evidence. The affidavit stated:

I, Erskin C. Melchor a Chicago Police Officer assigned to 003rd. District Tactical Unit received information from a reliable informant, whom I have used (5) times in the past relating to Narcotic activities, which have been true and accurate and has led to the arrest by me of (7) people and narcotics were found each time. Of these arrests there were (4) conviction[s]. This informant stated to me on 12 Feb. 74 he was at the apartment of Larry Macon at 6911 So. Wabash ave. 1st fl. and while there Larry Macon was in the process of sorting the marijuana into \$5.00 and \$10.00 bags[.][T]he informant stated he saw a large quantity of Marijuana still on the table in the kitchen. On this same date 12 Feb. 74 reporting officer immediately put the premises under surveillance and observed numerous people enter[,] stay a short time and then leave[.] [S]ome of these people reporting officer recognized as being arrested by me or members of the Chicago Police Dept. for narcotic violations. During this surveillance I observed a M/N now known as Dennis Thomas M/N 21 yrs. old enter the same location stay a short time and depart. I stopped him for questioning and a subsequent search of his person revealed one manila envelope containing crushed plant (suspect marijuana). Suspect was arrested and charged with possession of marijuana, appeared in branch #25 13 Feb. 74 and was convicted. Based on above information and observation and investigation I believe that Narcotic Marijuana is being sold and is on subject premise. I have known said informant for the past (18) months.

After arguments by counsel the trial judge granted defendant's motion to quash the search warrant and suppress evidence, stating:

"I am basing my finding first of all, on the fact that there is no date set for the conversation [between Officer Melchor and his informant]. Secondly there is no manner in which the indication that the contraband sought was marijuana. Third, that the officer states that while he did have the premises under surveillance that he stopped for questioning and searched one man, which would be getting something from an illegal arrest."

The trial judge's first reason for quashing the search warrant was that there was no date stated for the conversation between

the police officer and the informant. In the complaint for search warrant Officer Melchor stated that he had a conversation with an informant who stated that on February 12, 1974 he was present in defendant's apartment and observed him sorting and packaging five-and ten-dollar bags of marijuana. The officer further stated that "On this same date 12 Feb. 74" he put the premises under surveillance. If he had a conversation with the informant who told him he was at defendant's apartment on February 12, 1974, and the officer put the premises under surveillance on February 12, 1974, it is obvious that the officer's conversation with the informant had to occur on February 12, 1974. Further, the officer's statement "On this same date 12 Feb. 74," indicates that the conversation with the informant took place on February 12, 1974, since the phrase referred to the prior sentence in which he stated he had a conversation with the informant. The complaint, when read in a practical and realistic manner, indicates that the conversation with the informant took place on February 12, 1974.

The trial judge's second reason for quashing the search warrant and suppressing the evidence was that there was no indication that the contraband sought was marijuana. Affidavits for search warrants are to be interpreted in a realistic manner and should not be tested by elaborately technical requirements. (People v. Peavy (1971), 1 Ill.App.3d 478, 274 N.E.2d 892.) The affiant is not required to set out minute details in the affidavit for a warrant. (People v. Levin (1973), 12 Ill. App.3d 879, 299 N.E.2d 336.) In the instant case the affidavit

stated that the informant had told the police he was in defendant's apartment when he saw defendant sorting marijuana into five- and ten-dollar bags. The informant had given the police information on five prior occasions which had led to seven arrests, four convictions, and narcotics being found on each occasion. This prior reliability indicated a knowledge of narcotics on the informant's part. In addition, we have the officer's surveillance stating that people who were known to use narcotics were seen to enter defendant's apartment, stay for a short time, then leave. Further, the officer stated that he arrested one of the people after he left defendant's apartment, and found marijuana. This information considered together was sufficient to establish probable cause to believe there was marijuana in defendant's apartment. People v. Zacharia, ____ Ill.App.3d ____, ____ N.E.2d ____ (No. 59938, decided October 17, 1974.)

The third reason given by the trial judge for quashing the search warrant was that the officer's conduct in stopping one man who left defendant's apartment and questioning and searching him constituted illegal arrest. The affidavit by the officer in the complaint for search warrant did not indicate all the circumstances surrounding the arrest. The officer indicated only that the man had left the apartment, was stopped and searched and that marijuana was found on his person. That man was subsequently convicted of possession of marijuana. These were the only facts relevant to the issuance of the search warrant. Since all the details of the

arrest were not set forth in the affidavit the trial judge did not have a sufficient basis upon which to conclude that the arrest was illegal. Further, since the defendant was not the man arrested, he was not in a position to challenge the possible illegality of that arrest. People v. McNeil (1972), 53 Ill.2d 187, 290 N.E.2d 602.

Accordingly, the judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Judgment reversed;
cause remanded with
directions.

25 I.A. 535 ^{3D}

No. 60571

APR 2 1975

PEOPLE OF THE STATE OF ILLINOIS,)
)
Respondent-Appellee,) Appeal from the Circuit
) Court of Cook County.
v.)
)
ORANGIE L. RICHIE,) Marvin E. Aspen, J.
)
Petitioner-Appellant.)

BEFORE MCGLOON, PJ., McNAMARA AND DEMPSEY, JJ.

PER CURIAM:

Orangie L. Richie, petitioner, was originally charged by two separate indictments with the crime of armed robbery (Ill.Rev.Stat. 1971, ch. 38, par. 18-2). On June 14, 1972, petitioner entered a negotiated plea of guilty to both indictments and was sentenced to concurrent terms of five years to five years and one day. Petitioner did not appeal his conviction but on March 28, 1973, he filed a pro se post-conviction petition. The public defender of Cook County was appointed to represent petitioner and a supplemental petition was filed. On December 5, 1973, upon motion of the State, petitioner's post-conviction petition was dismissed without an evidentiary hearing.

Petitioner wished to appeal the dismissal of his post-conviction petition and a public defender of Cook County was appointed to represent him. After examining the record the public defender has filed a motion in this court with leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California (1967), 386 U.S. 738, a brief in support of the motion has also been filed. The brief states

that the only possible argument which could be raised on appeal is that defendant was entitled to post-conviction relief on the allegations in his post-conviction petition that the trial judge in accepting his plea of guilty failed to properly admonish him as to the nature of the charge and that he was denied equal protection of the law since at age 17 he was treated as an adult whereas a female similarly situated would have received the protection of the Juvenile Court Act. The brief concludes that on appeal these issues would be wholly frivolous and without merit. Petitioner was mailed copies of the motion of brief on October 18, 1974. He was informed that he had until December 17, 1974 to file any additional points he might choose in support of his appeal. He has not responded.

The first possible argument which could be raised on appeal is that petitioner is entitled to post-conviction relief on the allegation in his post-conviction petition that the trial judge in accepting his plea of guilty failed to admonish him as to the nature of the charge. Supreme Court Rule 402 (Ill.Rev.Stat. 1971, ch. 110A, par. 402), which was in effect at the time petitioner entered his plea of guilty, requires the trial court to advise the defendant as to the nature of the charge. However, the rule does not require the trial judge to recite all the facts which constitute the offense. The admonition of the crime by name has been held sufficient to apprise the defendant of the nature of the crime charged.

People v. Krantz (1974), 58 Ill.2d 187, 317 N.E.2d 559;
People v. Carrion (1974), 21 Ill.App.3d 195, 315 N.E.2d
 251; People v. Tennyson (1972), 9 Ill.App.3d 329, 292 N.E.
 2d 223.

In the case at bar, petitioner entered a negotiated plea of guilty only after a pre-trial conference with the court knowing the exact sentence which he would receive. The trial judge, in accepting petitioner's plea of guilty, specifically admonished him that he was charged in each indictment with the crime of armed robbery. Petitioner was also admonished as to the possible statutory penalties for the crime of armed robbery. These admonishments were sufficient to apprise the petitioner of the nature of the crimes with which he was charged.

The second possible argument which could be raised on appeal is that petitioner was entitled to post-conviction relief on the allegation in his post-conviction petition that he was denied equal protection of the law since at age 17 he was treated as an adult, whereas a female similarly situated would have received the protection of the Juvenile Court Act. This very contention has been rejected by the Illinois Supreme Court. People v. Ellis (1974), 57 Ill. 2d 127, 311 N.E.2d 98. Petitioner was in no way denied equal protection of the law by being treated as an adult at age 17.

We have examined the record and concur in the opinion of the public defender that none of the arguments thus raised

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has substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous. Accordingly, the public defender of Cook County is granted leave to withdraw as counsel on appeal and the judgment of the circuit court of Cook County is affirmed.

MOTION ALLOWED;
JUDGMENT AFFIRMED.

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58917

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM CIRCUIT
)	COURT OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
JOSEPH HALL, JR.,	)	HONORABLE
	)	ROBERT L. MASSEY,
Defendant-Appellant.)	)	PRESIDING.

MR. JUSTICE DRUCKER delivered the opinion of the court:

Defendant, together with Michael Young, were indicted for the armed robbery (Ill. Rev. Stat. 1971, ch. 38, par. 18-2) of James Walker. Tried alone without a jury he was convicted and sentenced to five to eight years. On appeal he argues that he received ineffective assistance of counsel, and that he was not proven guilty beyond a reasonable doubt. In light of the arguments raised, the evidence adduced at trial will be set out in some detail.

Jerome Bordelon, a Chicago police officer, testified as a witness for the State that on February 1, 1972, at 1:45 A.M., he and W. Bregin, his partner since deceased, responded to a call of a burglary in progress at 7006 South Chappel, Chicago, Illinois. Driving into an alley to cover the rear of the building, they noticed a 1970 blue Chevrolet auto parked nearby. They left their squadrol and entered the rear of the building where they noticed defendant walking down the stairs carrying two suitcases and a box under his arm. Defendant was about four stairs off the ground. Bordelon ordered defendant to "halt" and defendant responded, "What am I doing wrong. I just got thrown out of my mother-in-law's apartment."

Bordelon again ordered defendant to "halt" and to put his hands on the wall. Defendant complied and faced the wall. As he and Bregin were searching him, defendant struck the officers. There was snow on the ground and Bordelon fell down. Defendant started to run away but was caught and wrestled to the ground.

After a struggle, the officers handcuffed him, got him to his feet and noticed a pistol fall from his waistband. The pistol carried by defendant was just stuck in his belt, not in a holster. They then placed him in custody. The pistol was later determined to be a loaded 9 mm. Browning automatic.

The State's Attorney attempted to introduce evidence that defendant and three other persons had participated in the 7006 South Chappel burglary and that two of them, Charles Hall and Daryll Watkins, had forfeited their bonds at a preliminary hearing. Defense objection to this evidence was sustained, but defense counsel's notion for a mistrial on grounds that the State's Attorney continued to give the court possibly inadmissible information was denied.

Bordelon testified that five other policemen responded to the call and that the others covered the front of the building. He also recounted inventorying personal property and a weapon and ammunition. He ran a registration and name check on the license plates of the 1970 auto in the alley. The car was registered to defendant and was taken into police custody.

On cross-examination it was brought out that Bordelon made an arrest report which was then given to defense counsel. He admitted not making notes of his conversation with defendant about being put out of his mother-in-law's home, nor did he include this statement in his arrest report. The police reports did not mention that defendant was carrying a box under his arm. As to the attempted escape, defendant cooperated with the police until they started to pat the area of his armpits, at which time he struck the officers and fled. Defense counsel tried to establish that the police were tickling defendant just before he struck them. Defendant had used his elbows, not his fists, and he never drew his gun although he had the opportunity to do so. The suitcases contained men's suits. He never saw defendant come from the first floor landing where the personal property, other than the suitcases, was recovered.

James Walker, the victim of the armed robbery, testified as a witness for the State. On February 1, 1972, he lived in a first floor apartment at 7006 South Chappel Avenue. At approximately midnight Young rang his doorbell. When he opened the door, defendant and Charles Hall, both with guns, followed Young into the apartment and pushed him down. Walker identified defendant in court. The men told him it was a stick-up, ripped the phone out, beat him, knocked him to the floor and made Young tie his hands behind his back with a telephone cord. Defendant asked him for dope and money, repeatedly beat him in the face, kicked him in the back and threatened to kill him. Defendant and Young put a pillowcase over his head and later Young pulled the pillowcase up so he could see out of one eye and breathe. Defendant, who was armed, threatened to kill him because he could identify defendant. He identified People's Exhibit 9 as the gun defendant was holding. One of the other men told defendant they were leaving to go pull the car around to the alley.

Walker heard someone say "halt." He then hobbled to the window and yelled for help. Young and the other participants in the robbery then jumped out the front window. He saw Young jump out the window but couldn't actually see the other two jump because he was kind of wobbly; he saw the tail end of defendant going out the window.

Defendant had taken the keys to his apartment. The people had remained in the apartment for about an hour and his eyes were covered for 20 minutes at the most. The police took him down the back stairs where he saw the personal property taken from his apartment, including two suitcases which bore his initials, "J.W." He identified Charles Hall, Young, Watkins and defendant at the police station.

On cross-examination it was brought out that Walker got to his

feet when he heard someone yell "halt" outside the apartment, and that defendant and Young were still in the apartment when the word "halt" was yelled. He subsequently stated that three people were still in the apartment. Defendant went to the front window and jumped out. Defendant was dressed in a dark pair of pants, a green-like army jacket, and his hair was in braids. He and Young had played ball in the back before that night, but Young had never been in his apartment before.

Walker also stated that he never saw the last man who came into the apartment until he saw him at the police station. At the time the fourth man came into the apartment, his eyes were not completely covered, but he could not see him distinctly or clearly.

When again questioned about defendant's exit from the apartment, he stated that upon looking out the window he saw that the police had captured two men, and he told them he had been robbed. It was a little time after this that defendant jumped out the window.

In an examination by the court he was asked whether he had seen defendant go out the window when the police came in or when someone hollered "halt." He answered that he saw the tail end of defendant go out the window. He also described the building and the surrounding location.

Officer Ford of the Chicago Police Department was called as the State's final witness. At 1:43 A.M. on February 1, 1972, he and other officers heard a burglary in progress call at 7006 South Chappel. He arrived on the scene, started to look for the place of offense and noticed three men jumping out the first floor window, one right after another. He then gave a command to "halt." After a chase, the police apprehended these three men, Charles Hall, Young and Watkins, in front of the building. During the chase he had not been watching the window nor could he see the window.

Upon entering the apartment he found Walker lying on the floor with his hands tied behind his back with a telephone cord. The place had been ransacked. Walker had been beaten, bloodied and bruised. A loaded revolver was discovered behind a couch cushion.

On cross-examination he identified the recovered suitcases and a gun but could not recall whether it was bloody when it was recovered. He again reiterated that he bellowed "halt" after the three men had already jumped from the window.

It was stipulated that defendant was 35 years old.

Defendant, in his own behalf, testified that he was related to Charles Hall and that he knew Young and Watkins, having met them in connection with his employment as a Y.M.C.A. program director. Young was 16 or 17 years old at the time of trial, while Watkins was about 22 years old. He denied knowing Walker or ever being inside Walker's apartment. He had had a telephone conversation with Young on February 1, 1972, and pursuant to that conversation he went to the rear of 7006 South Chappel to bring Young's clothing to his apartment. He met Young on the back stairs; Young asked him to move his stuff and handed him two suitcases. As he was walking down the stairs he was apprehended by the police and arrested. He denied that he had participated in a crime, confronted Walker with a gun or come into any bodily contact with Walker. He also denied jumping out the front window or taking property from Walker.

On cross-examination defendant testified that he had been staying with his aunt at 7018 South Chappel for about two weeks as of February 1, 1972. Charles Hall, who was about 21 years old, was his cousin. Defendant admitted ownership of the gun but testified that the police officers must have taken it from the glove compartment of his auto. He had left the gun in the glove compartment less than a week before.

Opinion

Defendant initially contends that he was denied effective assistance of counsel because his trial attorney, who also represented defendant at his preliminary hearing, (a) failed to move to suppress the identification at trial based on an allegedly suggestive identification at the preliminary hearing and (b) failed to impeach either Walker's identification at trial or other trial testimony through prior inconsistent statements made in the preliminary hearing.

At the preliminary hearing only defendant and Young were present. After Walker testified to the facts surrounding the entry into his apartment, he initially stated that he didn't see in the courtroom either of the two persons who followed Young into the apartment. Further questioning of Walker raised some uncertainty as to the identity of which men were doing which actions and as to which Hall Walker was referring. Walker, when asked, "Do you see that man in court today?" responded, "I don't know." This confusion surrounding the identification was then discussed by the court and both counsel. The State's Attorney then rephrased his question and asked, "Do you remember the man you refer to as Joseph Hall in court today?" Walker answered, "The tall fellow" and indicated defendant Joseph Hall. On cross-examination when asked about the inconsistency in his initial identification testimony, Walker explained that he had the names mixed up, the people mixed up, and that he needed time to think.

The standard governing ineffective assistance of counsel was discussed in People v. Fleming, 50 Ill.2d 141, 145, 277 N.E.2d 872, wherein it was stated:

"[H]is judgment of conviction will not be reversed merely because his counsel failed to exercise the greatest skill or for the reason that it might appear, in looking back over the trial, that he had made some tactical blunder. [Citations.] This court

has said that ordinarily a defendant who retains counsel of his own selection is responsible if that counsel does not faithfully serve his interests; that any other rule would put a premium upon pretended incompetence of counsel, for if the rule were otherwise, a lawyer with a desperate case would have only to neglect it in order to insure reversal or vacation of the conviction.' (People v. Stephens, 6 Ill.2d 257, 259.) Thus, a defendant will not, unless the representation was so inadequate as to reduce a proceeding to a farce (People v. Nelson, 42 Ill.2d 172), be heard to complain of his retained counsel." [Emphasis supplied.]

Although each case must be judged by its own facts and circumstances (People v. Bliss, 44 Ill.2d 363, 255 N.E.2d 405), in order to sustain this contention, actual incompetence must be demonstrated along with substantial prejudice without which the outcome would probably have been different. (People v. Travis, 10 Ill. App.3d 714, 295 N.E.2d 325.) "Matters going to the exercise of judgment and discretion and trial tactics are insufficient to establish the incompetence of counsel." (People v. Newell, 48 Ill.2d 382, 387, 268 N.E.2d 17.) Furthermore, whether or not a motion to suppress should be filed in a criminal case has been held to be **a matter of trial tactics**. People v. Moore, 17 Ill. App.3d 507, 308 N.E.2d 210; People v. Neal, 15 Ill. App.3d 940, 306 N.E.2d 43.

Defendant's primary argument is that his counsel should have used the proceedings at the preliminary hearing as the basis either for a motion to suppress the identification at trial or for impeachment purposes. The identification at the preliminary hearing was never brought out at trial. Only the in-court trial identification is in question. Even assuming the preliminary hearing identification was unnecessarily suggestive,¹ the identification at trial will

1. Although defendant has made this allegation, he has not pointed to any surrounding facts, other than the preliminary hearing testimony itself, to show this alleged suggestiveness.

not be suppressed if it is shown by clear and convincing evidence that the identification had an independent origin arising from the witness' uninfluenced observation of the accused. People v. Patrick, 53 Ill.2d 201, 290 N.E.2d 227; People v. Johnson, 45 Ill. 2d 501, 259 N.E.2d 796; U.S. v. Wade, 383 U.S. 218, 87 S.Ct. 1926, 18 L. Ed.2d 1149.

There was testimony establishing that this armed robbery occurred over a period of at least one hour, during which time Walker was blindfolded for at most 20 minutes. Walker was in close proximity to the intruders for most of this time and was unimpeded in his view of three of the four participants.² There was also evidence that Walker's life was threatened by defendant because he was able to identify both defendant and his cousin, Charles Hall. We find that despite the inconsistencies in Walker's preliminary hearing testimony, the identification at trial was based on an observation, independent of the preliminary hearing, and a motion to suppress such identification, if made, would properly have been denied. Therefore, trial counsel cannot be criticized for failure to make a motion which would have been unavailing. Johnson.

Defendant also argues that counsel should have used Walker's prior inconsistent identification testimony to impeach his identification at trial. It should be remembered that Walker explained this inconsistency by stating that he was confused. While counsel could have used such a tactic, it would have brought to the attention of the trier of fact that Walker did make a prior identification of defendant and would also have elicited facts showing Walker's excellent opportunity to view defendant. Instead,

2. Walker averred that defendant was one of the initial three persons who broke into his apartment, and any question as to Walker's ability to identify the fourth man is not pertinent to Walker's ability to identify defendant.

defendant's counsel through his questioning and trial conduct tried to demonstrate that defendant, arrested on the back stairs, could not have been the man Walker identified going out the front window. This theory was advanced by attempting to show defendant's location and possible location when Walker heard a shout of "halt." Counsel additionally presented to the trier of fact an explanation for defendant's presence on the back stairs, which if believed would be consistent with defendant's assertion that he is innocent. Even if this court were to evaluate this trial tactic of defendant's counsel, we do not feel it probative to show that defendant received ineffective assistance of counsel.

Defendant also asserts that several other inconsistencies between Walker's preliminary hearing testimony and his testimony at trial were not brought out. He points to Walker's contention at trial that he never saw the fourth man who came into the apartment until he reached the police station, whereas he had previously testified that he could identify this man. Walker's trial testimony in itself clears this apparent conflict when on cross-examination he stated that because his eyes were partially covered, he couldn't see the fourth man distinctly although he did view him. Other alleged inconsistencies involve: (a) whether Young and defendant put the pillowcase over Walker, or whether Young alone and upon directions from defendant put the pillowcase over his head; (b) which person or persons kicked Walker; and (c) who said they would get the car. We find that in the context of the entire record these inconsistencies, even if they be denominated as such, are minor and would not have affected the outcome of this case.

A careful review of the record reveals that defendant's counsel vigorously protected the rights of his client. Initially he was instrumental in forcing the State's Attorney to decide to

S.O.L. (stricken on leave to reinstate) the misdemeanor charges against defendant. Throughout the trial he repeatedly objected to improper evidence being brought to the attention of the court. Through skillful questioning, he was able to fully present defendant's theory of innocence and attempted to impeach the State's witnesses. Finally, we note that some of defendant's trial counsel's arguments were adopted by defendant's appellate counsel in his brief. Viewing the record as a whole we conclude that the proceedings were not reduced to a farce (Fleming); thus defendant was not deprived of effective assistance of counsel.

Defendant next contends that he was not proven guilty beyond a reasonable doubt. Adopting the theory of trial counsel, he argues that Walker testified that defendant was one of three men he saw jump out the window after he heard the shout of "halt." Since Officer Ford shouted "halt" only after he saw three men leave the apartment through the window and Officer Bordelon yelled "halt" when he saw defendant on the back stairs, defendant argues that he could not have been in the apartment when Walker heard the cry of "halt." Defendant also points out that the apartment keys were never found in his possession; that there was a large age difference between himself and the other three men arrested; that his economic and family background were not such as to be a motivation for criminal behavior; and that committing the armed robbery in such close proximity to his residence, where detection would be easy, are factors which when taken in conjunction with the allegedly questionable identification establish a reasonable doubt of his guilt.

The function of evaluating the credibility of witnesses is for the trial court in the absence of a jury. Its determination will not be set aside on review unless the proof is so unsatisfactory as to create a reasonable doubt as to the defendant's

guilt. (People v. Clay, 55 Ill.2d 501, 304 N.E.2d 280.)

Defendant has argued that this court should not attach great weight to the findings of the trier of fact because of certain conduct and statements by the court which he feels demonstrate that the court was uncertain in reaching its decision. Upon review of the record we cannot say that the court exhibited any uncertainty in reaching its decision.

Although it cannot be denied that there are some inconsistencies in Walker's testimony regarding the exiting of these men from his apartment, he did identify defendant as one of the three men who originally broke into his apartment. Walker also testified at one point in the trial that it was only after he looked out the window and saw some of the men had been apprehended that defendant made his escape. This would have occurred after Officer Ford yelled "halt." Then while Officer Ford was in the process of arresting the three men in front of the building, defendant could have made his way to the back of the building to retrieve the loot. As we have already stated, it was primarily for the trier of fact to evaluate the evidence and reconcile any inconsistencies which were present. It should also be mentioned that any one of the four other policemen present could have shouted "halt."

It must also be considered that defendant was caught on the apartment's back stairs carrying two suitcases belonging to Walker and with his initials on them; that defendant was carrying a gun identified as being involved in the armed robbery; that when apprehended defendant violently tried to escape; that defendant's immediate explanation of his presence at the scene to Officer Bordelon contradicted his trial testimony; that Walker did identify defendant; and that defendant's story about helping Young move at 1:30 in the morning on a snowy day is

highly improbable. Defendant's flight can be considered as evidence of his guilt (People v. Davis, 29 Ill.2d 127, 193 N.E.2d 841; People v. Towers, 17 Ill. App.3d 467, 308 N.E.2d 223) as well as his recent possession of the stolen suitcases. (People v. Curtis, 7 Ill. App.3d 520, 288 N.E.2d 35.) If, as here, a defendant elects to make an explanation, he must tell a plausible story or be judged by its improbability. People v. Karrelan, 6 Ill. App.3d 1066, 286 N.E.2d 613.

Upon reviewing the record as a whole, we find that the evidence is not so unsatisfactory as to leave a reasonable doubt of defendant's guilt. The judgment is affirmed.

AFFIRMED.

Lorenz and Sullivan, JJ., concur.

Abstract only.



25 I.A. ³⁰ 557

NO. 59270

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 v.)
)
 JAMES E. BENNETT,)
)
 Defendant-Appellant.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

HONORABLE
JAMES M. BAILEY,
PRESIDING.

Before Barrett, P.J., Sullivan, J. and Lorenz, J.
Per Curiam (First District, Fifth Division)

Defendant appeals from the revocation of his probation and his sentence to a term of not less than two years nor more than eight years in the penitentiary. On appeal he contends: (1) that the petition seeking revocation of his probation is defective because it fails to charge him with violating any criminal statute during his period of probation; (2) that his constitutional right to due process of law was violated when, on his guilty plea to the probation violation charge, the trial court did not admonish him in accordance with Rule 402 of the Illinois Supreme Court; and (3) that the sentence was excessive.

He was originally charged with theft in violation of section 16-1(a)(1) of the Criminal Code. (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1).) On September 18, 1972, he entered a plea of guilty and was placed on probation for a period of five years with the condition that the first six months be served in the County Jail.

On April 23, 1973, Brilla McInnis of the Probation Department filed an application for an arrest warrant against defendant for violation of probation. On May 8, 1973, the State's Attorney filed a petition alleging that defendant violated the conditions of his probation because "on April 26, 1973, [he] was found guilty of the offenses of Deceptive Practice and Theft of Lost Property *** and sentenced to a term of [30] days in the House of Correction. "

On May 9, 1973, a hearing was held to consider the revocation of defendant's probation. Before the taking of testimony, the following discussion took place between the trial court, counsel and defendant:

MR. CAREY [Assistant Public Defender]: Your Honor, Mr. Bennett is before your Honor on a violation of probation. We had previously been served with a copy of the rule where it is alleged that Mr. Bennett violated his probation by virtue of a conviction for which he served 30 days and he is due to be released.

When is the out date, do you know?

THE DEFENDANT: My out date was Saturday.

MR. CAREY: Okay. He will be released Saturday. We are not contesting the fact of the conviction but I would like in the course of this hearing to have the defendant sworn so he could address the Court.

MR. SILES [Assistant State's Attorney]: Judge, before we proceed, will there be a stipulation by the defendant that in fact on September 13, 1972, the defendant was convicted of theft and placed on five years probation by his Honor and that on the 26th of April, 1973, while the defendant was in the midst of his period of probation, the defendant was found guilty of the offense of deceptive practice and also two offenses, two counts of theft of lost property, for which he was sentenced to 30 days in the House of Correction.

Would that be so stipulated?

MR. CAREY: Is that right?

THE DEFENDANT: Yes.

MR. CAREY: Okay, we will stipulate to that.

MR. SILES: May that stipulation, your Honor, be entered into the record?

THE COURT: Yes.

MR. SILES: Thank You.

Defendant testified that he happened to come into possession of an envelope which contained three credit cards. He tried to make a purchase with the cards but got scared. He had the cards for one day when he was arrested. He is 30 years old; he does not drink, take drugs or stay out late; and he does not keep bad company. He and his counsel asked the trial court to reinstate his probation.

In aggravation, the Assistant State's Attorney stated defendant was placed on 19 months probation in 1970 in the Federal Court for making, altering and forging a United States Treasury bond; that in 1970 he was placed on probation for the offense of theft; and that he was convicted of theft in 1971 and sentenced to six months in the House of Correction.

The Assistant State's Attorney also stated that on September 18, 1972, in the present case, defendant was convicted of three counts of theft.

In passing sentence the trial court said:

My reason is, apparently nothing has worked in the past, and apparently you still get in trouble. Granted you have not inflicted bodily injury on people or anything else but at the time I placed you on probation and I don't ordinarily give probation, and the reason I don't is for the simple reason you are here before me today.

When I give you probation, I tell you I am going to give you something if you violate it and based upon the circumstances and so forth, that is what I'm going to give you, what I promised you.

At the time I placed you on probation, I told you if you had problems or if you need assistance, see the probation officer and if he doesn't help you, come to me, if you have problems, come to me. You chose not to. You chose to get involved in something else, knowing you were on probation to me.

* * * *

Your client has been down this road many, many times before, and for this reason, the defendant will be sentenced to the Illinois State Penitentiary for a minimum of two years to a maximum of eight years.

OPINION

Defendant argues the State's petition failed to allege that the events leading to his conviction on April 26, 1973, were within the probationary period and, therefore, the petition was void and the trial court was deprived of jurisdiction. He further contends that the evidence and the stipulation of the parties pertains only to the date of the conviction and not that he committed any crime during the period of his probation.

The State contends the evidence shows that defendant violated the conditions of his probation; and that any alleged defects in the petition for probation revocation were waived by defendant because of his failure to raise the issue in the trial court.

In People v. Headrick, 54 Ill. App. 2d 44, 203 N.E.2d 157, defendant contended that the petition for probation revocation did not allege facts; that it contained hearsay; and that it was vague and uncertain. The court held that since the record did not disclose the point was raised in the trial court it could not be raised for the first time on appeal.

Other cases to the same effect are People v. Whittaker, 101 Ill. App. 2d 432, 243 N.E.2d 467; People v. Dotson, 111 Ill. App. 2d 306, 250 N.E.2d 174.

In People v. Henderson, 2 Ill. App. 3d 401, 276 N.E.2d 372, the court held that "claims such as impropriety in use of hearsay testimony and unsworn testimony may not be raised for the first time on appeal" from a revocation of probation, saying:

It is fundamental and basic that this court can review only errors committed at the trial. Where no objection is raised, error, if any exists, has been waived. Thus, in the case at bar, claims such as impropriety in use of hearsay testimony and unsworn testimony may not be raised for the first time in this court on appeal. Unless timely objection to incompetent evidence is made at the trial level, the point may not be raised on appeal. (People v. Eubank, 46 Ill.2d 383, 388; People v. Harris, 33 Ill.2d 389, 390; People v. Ridener, 129 Ill.App.2d 105, 107; People v. Davis, 126 Ill. App.2d 114, 117.) This principle is applicable even to objections upon constitutional grounds. People v. Linus, 48 Ill.2d 349, 355, and People v. Thompson, 48 Ill.2d 41, 46.

Defendant concedes that if he had "violated any criminal statute of any jurisdiction, including Illinois, during the period of his probation, he would have been guilty of violating a condition of his probation." The record discloses defendant and his counsel admitted defendant violated a criminal statute during the period of his probation. At the probation hearing defendant testified as follows:

- Q. First, let me ask you, what were the circumstances of the case you were convicted on?
- A. Well, the circumstances, you know, like --
- Q. Speak up so that the Judge can hear you.
- A. Well, like I was out, you know, when I was out, you know, like I run into somebody and he come along about 60th and Kimbark and from knowing it, I just saw some envelopes.
- Q. You saw some envelopes and there were credit cards in the envelope?
- A. Yes.
- Q. And after you had come into possession of these credit cards, you were arrested, is that correct?
- A. I got the cards, you know, and I was arrested.
- Q. Did you ever try to purchase anything with the credit cards?

A. Well, I got one, I tried and then I got scared, you know.

Q. Okay. How many credit cards did you have?

A. I had three.

Q. How long did you have them before you were arrested?

A. I didn't have them but a day.

It is apparent that when defendant stated: "I was out." he was referring to being out of jail, on probation. Furthermore, counsel for the defendant stated: "I just want to add in closing that this defendant was reporting to his probation officer, Mr. McGinnis [sic], and he had been on probation for only a short time and he came into possession of these credit cards."

It is apparent defendant and his counsel were referring to the time of defendant's five year probation granted by the trial court on September 18, 1972, because Brilla McInnis was the probation officer who, on April 23, 1973, signed the application for the warrant for violation of probation by defendant. Further, counsel for defendant stated that defendant came into possession of the credit cards shortly after defendant was placed on probation.

In the case at bar, defendant stipulated that on April 26, 1973, while he was "in the midst of his period of probation, he was found guilty of the offense of deceptive practice and also two offenses, two counts of theft of lost property, for which he was sentenced to 30 days in the House of Correction." The courts have held a stipulation by defendant that he has been convicted of an offense during the period of probation was sufficient to sustain an order of revocation of probation. (People v. Thornton, 4 Ill. App. 3d 896, 282 N.E.2d 276; People v. Smith, 20 Ill. App. 3d 793, 314 N.E.2d 510 (Abst.).) The State sustained its burden of proving a probation violation by a preponderance of the evidence. People v. King, Appellate Court No. 59287, Opinion November 27, 1974.

In light of the foregoing, it is apparent defendant waived his right to object to the sufficiency of the petition because he failed to raise the point in the trial court. Also, the record shows that

defendant violated a criminal statute during the period of his probation and, therefore, the trial court properly revoked defendant's probation.

Defendant also argues that the trial court's failure to admonish him under Supreme Court Rule 402 constituted a violation of due process. In People v. Beard, Supreme Court Nos. 46317, 46382, Cons., Opinion November 27, 1974, the court rejected this contention and held that Supreme Court Rule 402 is not applicable to probation revocation hearings.

The record reveals that at the hearing for probation revocation defendant was given notice and a copy of the charge, had an opportunity to be heard, was represented by counsel, and had a conscientious determination of his cause. (People v. Wilhite, 18 Ill. App. 3d 792, 310 N.E.2d 651 (Abst.); People v. Morales, 2 Ill. App. 3d 358, 276 N.E.2d 391.) The proceedings at the hearing did not in any manner deprive defendant of due process of law. In the case at bar, the trial court was not required to admonish defendant pursuant to Supreme Court Rule 402.

Defendant's final argument is that his sentence is excessive and should be reduced. While this court has the authority to reduce a sentence, our Supreme Court has indicated that this authority should be exercised with considerable caution and circumspection. (People v. Fox, 48 Ill. 2d 239, 251-252, 269 N.E.2d 720, 728; People v. Taylor, 33 Ill.2d 417, 211 N.E.2d 673.) The imposition of sentences is within the discretion of the trial court and courts of review will not interfere with that discretion unless it is manifested that the sentence is excessive. (People v. Kendricks, 4 Ill. App. 3d 1029, 283 N.E.2d 273.) Here, considering the nature of the offense, the facts of the case and defendant's prior record, we cannot say that the sentence imposed was excessive.

For the foregoing reasons the judgment of the circuit court is affirmed.

Affirmed.

1-10-75



1 25 I.A. 558 ^{3D}

No. 59331

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
LAMONT DAVIS (otherwise called)
LAMONT LEE),)
)
Defendant-Appellant.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

HONORABLE
EARL E. STRAYHORN,
PRESIDING.

Before Barrett, P.J., Sullivan, J., and Lorenz, J.

Per Curiam (First District, Fifth Division)

Defendant was charged by indictment with violation of bail bond (commonly known as bail jumping) in violation of section 32-10 of the Criminal Code. (Ill. Rev. Stat. 1971, ch. 38, par. 32-10.) After a bench trial, he was found guilty and sentenced to a term of two to three years. He now appeals arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt and that his sentence is excessive under the Unified Code of Corrections.

At trial, it was stipulated that if Samuel Rosen were called to testify he would testify that he is a deputy clerk for the circuit court of Cook County. In that capacity he is custodian of certain criminal court records among which is a document commonly referred to as a half sheet, officially entitled "Memorandum of Orders" which are kept in the ordinary course of business and are under his personal control. File #72-1258 charges the defendant with the offense of delivery of a controlled substance. The half sheet of that file shows that on July 14, 1972, defendant personally appeared in court before Judge Richard J. Fitzgerald represented by counsel. Defendant's case was continued to August 11, 1972. On that date defendant's case was called before Judge Robert J. Massey. Defendant failed to appear and his bond was forfeited. A warrant was also issued for defendant's arrest. On September 13, 1972, defendant's case was called before Judge Joseph A. Power. At that time defendant again failed to appear and a judgment was entered on the bond forfeiture. The next time defendant appeared in court was on December 28, 1972.

It was further stipulated that bond slip D-7211 was also under

the control of Samuel Rosen and that it was made out to defendant on indictment 72-1258 on June 22, 1972 at 11:05 A.M. Defendant's address listed on the bond sheet was 4330 Lake Park, Chicago, Illinois. The slip was issued by Deputy Clerk A. Rzepczynski. At the bottom of the bond slip there appeared defendant's signature directly below the statement stating that defendant accepted the conditions expressed thereon. It also contained conditions for bail bond and noted the penalty for a violation as provided in ch. 38, section 32-10. Ill. Rev. Stat. 1971, ch. 38, par. 32-10.

Rosen also had under his control a notice of forfeiture of bail bond pertaining to indictment 72-1258 referring to bond number D-7211549 made out to the defendant. The notice was mailed to defendant at 4330 Lake Park, Chicago, Illinois on August 11, 1972 and informed him that his bail had been forfeited on August 11, 1972 because he failed to appear in court. It further notified him to appear in court on September 13, 1972 or a judgment would be entered against him for the amount of his bond

It was also stipulated that:

If Judge Richard J. Fitzgerald were called he would testify that he was present on July 14, 1972 when defendant's case was called, that the defendant was present in court and that the case was continued until August 11, 1972.

If Judge Robert L. Massey were called he would testify that he was present in court on August 11, 1972 when defendant's case was called. That the defendant failed to appear, defendant's bond was forfeited and a warrant was issued for his arrest.

If Judge Joseph A. Power were called he would testify that on September 13, 1972 he was present in court when defendant's case was called, that the defendant failed to appear.

If Deputy Clerk Rzepczynski were called he would testify that he made out defendant's bond slip which had been previously introduced into evidence. At that time he instructed the defendant to read the conditions of the bond stated on the bond slip.

Lamont Davis, defendant, testified that in 1972 he was admitted to bail on the charge of delivery of a controlled substance. He knew that he was to appear in court on August 11, 1972. On that date he was a narcotics addict and had been without drugs for one month; that he was not feeling too good and decided that he wasn't going to come to court until he had gotten some medication. On August 12, 1972, he came to the courtroom and asked one of the bailiffs what a person was supposed to do if he failed to appear in court and the bailiff informed him that he would receive a letter in the mail. Defendant testified that at the time he made bond he lived at 4330 South Lake Park, Chicago, Illinois, but moved to 3855 South Ellis, Chicago, Illinois, sometime in September; that he would call his previous address twice a week to see if he had received any mail from the court; that he received no mail until October when he received a letter from the court stating that he had failed to appear.

OPINION

Defendant's first contention on appeal is that the evidence was insufficient to establish his guilt beyond a reasonable doubt. He argues that when he initially failed to appear in court he was suffering from drug addiction and was not capable of forming any mental state required to incur the forfeiture of his bond. Defendant was charged with violation of bail bond (bail jumping) in violation of section 32-10 of the Criminal Code. (Ill. Rev. Stat. 1971, ch. 38, par. 32-10.) That section states:

Whoever, having been admitted to bail for appearance before any court of record in this State, incurs a forfeiture of the bail and willfully fails to surrender himself within 30 days following the date of such forfeiture, ***.

Under this statute the incurring of a forfeiture is not an element of the crime, but is rather a condition precedent, a fact the existence of which the crime of violation of bail bond is conditioned upon. People v. Arron, 15 Ill. App.3d 645, 305 N.E.2d 1.

The evidence adduced at trial clearly demonstrated that defendant knew he was to appear in court on August 11, 1972. His failure

to appear on that date was not an element of the crime but rather a condition precedent to the crime. When defendant failed to appear it did not immediately subject him to criminal liability. It was only after he willfully failed to appear for an additional thirty day period that he became subject to criminal sanctions. Defendant's own testimony established that although he was a narcotics addict he was aware that he was to appear in court on August 11, 1972 and that he did go to the courtroom on August 12, 1972. He was aware of his obligation to appear and was both physically and mentally able to appear within the thirty day period following his initial bond forfeiture.

Defendant also argues that his failure to surrender himself within thirty days was not willful since he was making a good faith effort to appear in court and was not aware that he was jumping bail by his failure to appear within thirty days. To sustain a conviction under the bail bond statute (Ill. Rev. Stat. 1971, ch. 38, par. 32-10.) it is not necessary for the State to establish that defendant knew he must surrender himself within thirty days. It is only necessary for the State to prove that the defendant incurred forfeiture of his bail; that he failed to surrender himself within thirty days following the date of such forfeiture and that his failure to surrender was willful. (People v. Lawson, 16 Ill. App. 3d 61, 305 N.E.2d 594 (abst.)) Conduct is performed willfully if it is performed knowingly. (Ill. Rev. Stat. 1971, ch. 38, par. 4-5.) It is well established that knowledge may be proven by circumstantial evidence. People v. Zazzetti, 6 Ill. App. 3d 858, 286 N.E.2d 745.

In the case at bar the evidence clearly demonstrated that defendant was arrested for possession of a controlled substance and was indicted under indictment #72-1258. He appeared in court on July 14, 1972 and his case was continued until August 11, 1972. He failed to appear in court on August 11, 1972 and for a period of thirty days thereafter. Defendant's own testimony established that he realized that as a condition to being placed on bond he was to appear in court and that he was aware of the court date on August 11, 1972. After defendant incurred a forfeiture of bail, a notice was sent to the address he listed on the

bond slip notifying him that judgment would be entered on the bond forfeiture unless he appeared in court on September 13, 1972. On that date he again failed to appear in court. While defendant testified that he did not receive any notice of forfeiture until October and made inquiries concerning when he should appear in court, a trial judge is not obliged to believe a defendant's testimony. (People v. Jones, 11 Ill. App. 3d 450, 297 N.E.2d 178.) After review of the entire record we conclude that the evidence was sufficient to constitute a basis upon which the trial court could conclude that defendant's acts were committed willfully.

Defendant's final contention is that his sentence of two to three years was improper under the Unified Code of Corrections and should be reduced. Since defendant's case has not yet reached the stage of final adjudication, the Code is applicable. (People v. Chupich, 53 Ill. 2d 572, 295 N.E.2d 1; People v. Harvey, 53 Ill. 2d 585, 294 N.E.2d 269.) Under the Code, bail jumping is a Class 4 felony. (Ill. Rev. Stat. 1973, ch. 38, par. 32-10.) The Code provides that the minimum sentence for a Class 4 felony shall be one year in all cases (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(c)(5).), and that the maximum term shall be any term in excess of one year, but not exceeding three years. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(b)(5).) Here, defendant's minimum sentence of two years is improper and must be reduced to one year.

Accordingly, the minimum sentence is reduced to a term of one year. As thus modified the judgment of the circuit court is affirmed.

Judgment affirmed as modified.



3D
125 I.A. 565

60158

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
JULIAN BELL,	)	HONORABLE
	)	BENJAMIN S. MACKOFF,
Defendant-Appellant.)	)	PRESIDING.

Per Curiam: First District, Fifth Division.

Before Drucker, Lorenz and Sullivan, J.J.

Defendant and Daniel Henderson were charged with the offense of armed robbery in violation of Section 18-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 18-2). Prior to trial the trial court allowed defendant's motion for a severance because Henderson had given a written statement incriminating defendant. Subsequently, at the request of defendant, counsel other than the public defender was appointed to represent him.

A jury found defendant guilty and he was sentenced to a term of not less than 10 years nor more than 30 years.

On appeal defendant contends that he was denied effective assistance of counsel and that the sentence was excessive.

At the trial Roy Beard, owner of Roy's Shell Station, 245 South Sacramento, Chicago, testified for the State that James Simmons worked for him on the 12:00 o'clock midnight to 8:00 A.M. shift. About 3:00 o'clock in the morning of September 12, 1972, Beard went to the gasoline station after being notified of a robbery. He determined that \$33 in cash had been stolen together with his .32 Smith and Wesson revolver which he described as blue steel with a dented black handle. Beard said the gun was kept in his office and his employees had permission to carry it while they were on the premises. He said the gun contained five bullets, four long and one short; that the gun was registered with both the City of Chicago and State of Illinois

and that it bore serial number H10680. Beard identified People's Exhibit 2 as the gun which was stolen from his Shell station.

Thomas Finnelly, a police officer for the City of Chicago, testified for the State that on September 16, 1972, he and his partner, Joseph Cannon, were in plain clothes and riding in an unmarked car at approximately 5636 West End, Chicago, when he saw defendant walking towards the car. Finnelly said he knew defendant by name and sight. He saw defendant reach in his waistband, pull out a gun and drop it in the bushes. The police officers stopped defendant, and Finnelly walked back to the bushes and found the gun. They then arrested defendant.

Finnelly said the gun contained four long .32 bullets and one short bullet. He scratched his initials on the gun and inventoried it. At the trial Finnelly identified People's Exhibit 2 as the gun he saw defendant drop in the bushes. He identified People's Exhibit 2-A as the bullets removed from the gun. Finnelly also identified defendant at the trial as the man who dropped the gun.

On cross-examination Finnelly testified that defendant was alone when he first observed him. He said another man was 25 to 30 feet away from defendant, but he was not with defendant.

In response to a question of the Assistant State's Attorney, "Could you tell me the circumstances of that arrest?" Finnelly stated, "Yes, we were looking for him for another robbery." Defendant's objection was sustained and the jury was instructed to disregard the answer.

Investigator Raymond Soltys of the Chicago Police Department testified for the State that he arrested Daniel Henderson on September 17, 1972, at 1400 South Kolin Street, Chicago. Henderson was driving a 1964 Cadillac, license number LK-8676. Soltys said he conducted a lineup which included the defendant and Henderson, at which Simmons was present.

Daniel Henderson, a witness for the State, testified he, defendant and another man rode to Roy's Shell Station at about 3:00 A.M. on September 12, 1972. Defendant was driving the automobile. Henderson said he did not get out of the car, but defendant got out and held a gun on Simmons and removed something from Simmons' pocket while a third person, whom Henderson did not know, held Simmons' arms. Henderson testified he was unarmed at the time and did not participate in the robbery. Henderson said he had not been promised anything in return for his testimony even though his case was still pending.

James Simmons testified for the State that at approximately 3:00 A.M. on September 12, 1972, a car with three or four men pulled up to a gas pump at Roy's Shell Station, 345 South Sacramento, Chicago, Illinois. He was alone at the time and walked in front of the car to the driver's side. Simmons said the area was lighted by six lights which were very bright. Defendant asked for \$2 worth of gasoline. Simmons said he looked at the front seat passenger, Daniel Henderson, and also observed defendant "very well." Simmons started to run gasoline into the car when the passenger from the rear seat got out of the car and asked for a key to the washroom. When Simmons turned to hang up the pump, the man returned the key to Simmons, grabbed him and forced both of Simmons' arms behind him, causing Simmons to drop the pump on the ground. Simmons observed defendant get out of the car, with his hand in his pocket. Defendant took a gun from his pocket, put it to Simmons' head, and said, "This is a stick-up."

Simmons said defendant ran his hand into Simmons' left pocket and removed a .32 revolver and handed it to the man holding Simmons' arms behind him. Simmons said defendant took approximately \$33 from Simmons' right front pocket, \$32 from his left rear pocket and his keys from his right rear pocket.

Simmons said that during this time both defendant and the other man held weapons to his head. Simmons testified that the two men took him into the station, at which time Simmons looked at defendant's face "very well" and saw that defendant's hair was processed, slicked back. Defendant hit Simmons on the side of the head with the gun and Simmons fell to the floor.

Simmons said that as the men drove away he wrote the license number of the car which, he testified, was either a 1963 or a 1964 Cadillac with license number LK-8676. Simmons then called the police.

On September 16, 1972, Simmons identified defendant in a lineup at the 15th Police District; and on September 17, 1972, he attended another lineup and identified defendant and Henderson. At the trial Simmons identified defendant and also the .32 caliber revolver as the one taken from him by defendant on September 12, 1972.

The defense called no witnesses and rested after its motion for a directed verdict was denied.

During closing argument to the jury counsel for defendant stated:

"Ladies and gentlemen, I think there is something that the State failed to bring out in this case; for that matter, neglected to bring to your attention.

"My client, Julian Bell, has a long, long history, a long, long criminal history, a long history. In fact, I don't have any particular love for him at all. That is not the question. The question is did he do this, was he involved in this, not whether --

"THE COURT: The jury is instructed to disregard counsel's remarks in this case which there has been no evidence in this hearing, not to take that into consideration at all in considering your verdict.

"MR. SEGAL [Defense counsel]: I don't have any love for him, and I'm sure many others don't have any love for him, but that is not

the issue. The issue is did he do this, was he involved in this, or were the other three individuals involved?

"Ladies and gentlemen, I'm sure after close scrutinizing of all the testimony, you will return a verdict of not guilty."

After the verdict the trial court said it saw no basis in the evidence for defense counsel's remarks, that the remarks were prejudicial to defendant, and that they would have justified a motion for a mistrial had it been made. Defense counsel replied that a police officer had made reference before the jury that defendant was being sought for another robbery; that the jury knew defendant had previous "difficulties with the law"; and that he had received defendant's permission to make the argument. Defense counsel produced a document signed by defendant authorizing defense counsel "to rest at the conclusion of the State's case and to argue to the jury that he dislikes me and he can discuss my prior record."

On interrogation by the court defendant stated he signed the document, and it was his intention for his counsel to mention before the jury that he had a long criminal record. The court stated that although it was "distracted," it would not take any further action in the matter in light of defendant's consent to the argument of his counsel.

Opinion

Defendant argues he was denied effective assistance of counsel and also a fair trial because of counsel's statement to the jury to the effect that defendant has "a long, long criminal history." Defendant states that by counsel emphasizing his criminal record counsel, in effect, abandoned defendant and assisted the prosecution.

To warrant a reversal because of incompetency of appointed counsel it must clearly appear, not only that counsel performed his trial duties in an incompetent manner, but also that defendant

was prejudiced thereby. (People v. Witherspoon, 55 Ill.2d 18, 302 N.E.2d 3; People v. Bernatowicz, 35 Ill.2d 192, 220 N.E.2d 745.) A review of the representation afforded by appointed counsel does not extend to matters of the exercise of judgment, discretion or trial tactics, even where counsel on appeal or the reviewing court might have acted in a different manner. People v. Stokes, 21 Ill. App.3d 754, 316 N.E.2d 127; People v. Tripp, 19 Ill. App.3d 200, 311 N.E.2d 168.

This principle was illustrated in People v. Walker, 2 Ill. App. 3d 1026, 1034, 279 N.E.2d 23, where defendant claimed ineffective assistance of counsel when he impeached his own witness and elicited information concerning the witness' prior convictions. The court affirmed the judgment, concluding "[t]his could have been an intentional trial tactic to demonstrate the absolute candor of his alibi witness."

In the case at bar a police officer said he was looking for the defendant "for another robbery." Defendant's objection was sustained, and the jury instructed to disregard the answer. However, defense counsel said the reason he told the jury of defendant's previous record was because the jury knew defendant had prior "difficulty with the law." It is therefore apparent that this was "an intentional trial tactic to demonstrate the absolute candor" of defendant. Further, defendant had signed a document authorizing defense counsel "to rest at the conclusion of the State's case and to argue to the jury that he dislikes me and he can discuss my prior record."

The uncontradicted evidence against defendant was overwhelming. Simmons, the victim of the crime, carefully observed defendant during the robbery. He wrote down the license number of the car driven by defendant. He identified defendant and Henderson, the owner of the car, from a lineup five days after

the robbery. His testimony was corroborated by Henderson. Also the gun, which defendant discarded in the bushes immediately prior to his arrest, was identified as the gun taken from Simmons at the time of the robbery and contained the same unusual combination of bullets. Under such circumstances defense counsel's display of candor and honesty to the jury, approved in writing by defendant, cannot be viewed as such an unreasonable trial tactic as to require reversal. This is especially true where it does not appear that substantial prejudice resulted therefrom and without which the outcome would probably have been different. (People v. Harper, 43 Ill.2d 368, 374, 253 N.E.2d 451.) At most, the statement was merely an error in judgment or trial strategy which will not establish incompetence. (People v. Somerville, 42 Ill.2d 1, 245 N.E.2d 461.) In the case at bar a complete review of the record demonstrates that defendant has failed to show incompetency of his trial counsel.

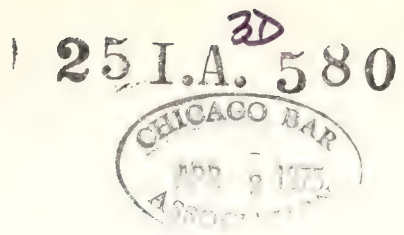
In a pro se supplemental brief defendant has urged us to consider several contentions, most of which relate to alleged incompetence of his trial counsel and the alleged denial of his right to testify. We have thoroughly reviewed the record and find no merit in these contentions.

Defendant also argues that his sentence is excessive and should be reduced. While this court has the authority to reduce a sentence, the Supreme Court has indicated that this authority should be exercised with considerable caution and circumspection. (People v. Taylor, 33 Ill.2d 417, 211 N.E.2d 673.) The imposition of sentences is within the discretion of the trial court, and courts of review will not interfere with that discretion unless it is manifested that the sentence is excessive. (People v. Kendricks, 4 Ill. App.3d 1029, 283 N.E.2d 273.) Here, considering the nature of the offense, the facts of the case and defendant's prior record, the sentence imposed was not excessive.

The judgment of the trial court is affirmed.

AFFIRMED.

Abstract only.



No. 59425

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
LAUNDRA WEBB and COLUMBUS SMITH,	)	KENNETH E. WILSON,
Defendants-Appellants.	)	JUDGE PRESIDING.

Before Downing, P.J., Stamos and Hayes, JJ.

PER CURIAM

Laundra Webb and Columbus Smith, defendants, were found guilty after a bench trial of the crime of armed robbery. (Ill. Rev. Stat. 1971, ch. 38, par. 18-2.) Webb was sentenced to a term of four to eight years and Smith to a term of four to five years. Defendants appeal, arguing that the evidence is insufficient to establish their guilt beyond a reasonable doubt. In addition, Smith argues that his sentence was excessive and should be reduced.

At trial Felix Rodriguez testified that in the early morning hours of June 11, 1972, he was on his way to work at the Northwestern Memorial Hospital where he is employed as a transportation orderly. At approximately 3:30 A.M. he was standing on the El platform at 21st and Kedzie when he was approached by the two defendants and three other men. Smith and two of the men approached him from the front while Webb and another man went to his rear. One of the men standing behind him put a knife to his throat and said "Okay. Give it up." Rodriguez testified that the men took his wallet, radio, watch, keys, and \$5.55. All five men then ran down the stairs of the station. Rodriguez followed the men down the stairs and observed them running northbound. Rodriguez stopped a passing squad car and informed the officers that he had just been robbed. The officers put Rodriguez in the rear of the squad car and proceeded down the street where Rodriguez identified Smith and Webb as two of the men who had robbed

him. At that location Rodriguez identified his radio, wallet and keys which had been taken in the robbery.

On cross-examination, Rodriguez admitted that at the preliminary hearing he had testified that when the men approached him on the El platform there were two men in front and three men behind him. At that time Rodriguez testified that he did not see who took the property from his person. He stated that Webb and Smith were standing among the group.

Allen Evans, a Chicago police officer, testified that on June 11, 1972, at approximately 3:15 A.M., he and his partner, Joseph Leiser, were flagged down by Rodriguez who informed them that he had just been robbed and that the men had fled northbound. Rodriguez was placed in the police vehicle and they proceeded in a northerly direction to the intersection of 19th and Kedzie. At the intersection of 19th and Kedzie, they observed a car parked on the corner. Webb and Smith were standing next to the car. At that time Rodriguez identified Webb and Smith as two of the men who had robbed him. Evans testified that he and his partner exited the car and ordered the people on the corner not to move. He then observed Webb put his arm into the front seat of the car and then pull it back quickly. A subsequent search of the area where Webb had put his hand disclosed a black wallet which was identified as the one taken from Rodriguez in the robbery. Keys which were identified as being taken in the robbery from Rodriguez and the knife identified as being used in the robbery were also found in the vehicle. The radio taken from Rodriguez was found partially under the vehicle.

Joseph Leiser, a Chicago police officer, was called by the defense and testified that at approximately 3:00 A.M. on June 11, 1972, he and his partner, Officer Allen Evans, were on routine patrol when they were flagged down by Rodriguez in the area of 21st and Kedzie. At that time Rodriguez informed them that he had just been robbed on the El platform

by five men who had fled northbound. Rodriguez was placed in the rear seat of the squad car and the officers pursued the offenders.

Columbus Smith, defendant, testified that in the early morning hours of June 11, 1972, he was going to the El station at 21st and Kedzie when he met Laundra Webb. Together they walked to the El station arriving at approximately 2:55 A.M. They stood on the El platform approximately fifteen feet from Felix Rodriguez. Smith testified that he observed three boys come up and grab Rodriguez. Smith then left the El platform, followed by Webb, and walked northbound. As he and Webb were standing near a car owned by Givins, they observed three or four men walk toward them carrying a radio. When a police car came down the street one of the men fell dropping the radio. The police then placed Smith and Webb under arrest. Smith denied that he was ever a part of any robbery of Rodriguez.

Defendants on appeal contend that the evidence is insufficient to establish their guilt beyond a reasonable doubt. First, they argue that the testimony of the complaining witness was contradictory, unbelievable and incapable of sustaining a conviction. In a bench trial the credibility of witnesses and the weight to be given to their testimony are matters for the trier of fact to determine. Only where the evidence is so unsatisfactory as to leave a reasonable doubt as to defendant's guilt will the findings of the trial court be disturbed. (People v. Hampton, 44 Ill. 2d 41, 253 N.E.2d 385; People v. Pointer 6 Ill. App. 3d 113, 285 N.E.2d 171.) The testimony of a single witness if positive and credible is sufficient to sustain a conviction even though contradicted by the accused. People v. Griffin, 12 Ill. App. 3d 193, 297 N.E.2d 770; People v. Hudson, 5 Ill. App. 3d 686, 284 N.E.2d 33.

In the case at bar, Felix Rodriguez testified that at approximately 3:30 A.M. on June 11, 1972, he was proceeding to

his place of employment when he was robbed by five men on the El platform at 21st and Kedzie. Rodriguez followed the men downstairs and observed them proceed northbound. He then stopped a passing police car and informed the officers of what had occurred. Rodriguez got into the squad car and proceeded to the corner where he identified the two defendants who were then placed under arrest. At trial, Rodriguez positively identified both defendants as two of the men who had robbed him. While the defense points to certain contradictions between the testimony of Rodriguez at trial and at the preliminary hearing, these were at best matters of credibility which were for the trier of fact to determine. (People v. Reese, 54 Ill. 2d 51, 294 N.E.2d 288; People v. Strother, 53 Ill. 2d 95, 290 N.E.2d 201.) After a complete review of all the evidence adduced at trial we conclude that the testimony of Rodriguez was positive, credible and sufficient to support defendants' convictions beyond a reasonable doubt.

Defendants next argue that the evidence was insufficient to show that they were legally accountable for the actions of others. Section 5-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 5-2) provides that a person is legally responsible for the conduct of another when:

"(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of that offense."

Where defendants have a common design to do an unlawful act, the act of any one of them done in furtherance of the common design is the act of all. (People v. Jones, 12 Ill. App. 3d 643, 299 N.E.2d 77.) Proof of the common design need not be supported by words of agreement but can be drawn from the circumstances surrounding the commission of the act. (People v. Richardson, 32 Ill. 2d 472, 207 N.E.2d 478.) While mere presence at the scene of a crime is insufficient to establish accountability, proof that a person is present at the

commission of a crime without disapproving or opposing the crime may be considered with other circumstances. People v. Hill, 39 Ill. 2d 125, 233 N.E.2d 367.

In the case at bar, the evidence demonstrated that in the early morning hours of June 11, 1972, Felix Rodriguez was waiting for an El train at the station at 21st and Kedzie when he was approached by five men. All five men approached together. He positively identified the two defendants as members of the group. Three of the men went in front of him while the other two went behind him. One of the men behind him put a knife to his neck and said "Okay. Give it up." The men then took his wallet, radio, watch, set of keys, and \$5.55. All five men then ran down the stairs of the station and proceeded northbound on the sidewalk. After the men left, Rodriguez went down the stairs of the El station, flagged down a passing squad car and informed the officers of what had occurred. Rodriguez got into the squad car and proceeded up the street where he identified the two defendants who were standing near a car. As the police officers approached, Webb put his arm into the front seat of the car and then pulled it away quickly. A subsequent search of the area of the car where Webb had put his hand disclosed a wallet which was identified as the one taken from Rodriguez in the robbery. Inside the car the police also found a set of keys taken from Rodriguez in the robbery and a knife which had been put to Rodriguez's throat during the robbery. Rodriguez's radio was found partially underneath the car. From the totality of these circumstances, the trial judge could have reasonably found that the defendants were more than just innocent bystanders and that they had lent their approval to the robbery by aiding and abetting in its commission. People v. Brown, 17 Ill. App. 3d 530, 308 N.E.2d 287; People v. Ramos, 14 Ill. App. 3d 774, 303 N.E.2d 439.

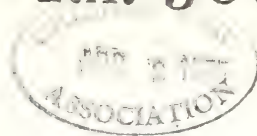
Defendant Smith also argues that his sentence is excessive in view of his lack of a prior criminal record and should

be reduced to a term of periodic imprisonment under the Unified Code of Corrections. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-5-3(d)(2).) While this court has the power to reduce sentences, that power should be exercised with caution and circumspection because the trial judge has a superior opportunity during the course of a trial and the hearing in aggravation and mitigation to determine the proper sentence than do reviewing courts. (People v. Caldwell, 39 Ill. 2d 346, 236 N.E.2d 706; People v. Taylor, 33 Ill. 2d 417, 211 N.E.2d 673.) Here defendant was convicted of armed robbery in violation of Section 18-2 of the Criminal Code, the penalty for which at the time of the commission of the crime was a minimum of five years. (Ill. Rev. Stat. 1971, ch. 38, par. 18-2.) Under the Unified Code of Corrections, armed robbery is a Class 1 felony (Ill. Rev. Stat. 1973, ch. 38, par. 18-2) and the minimum possible sentence is a term of four years. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(c)(2).) After a review of the record we conclude that defendant's sentence of four to five years is within the statutory limits for the offense charged and is not disproportionate to the nature of the offense.

For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

(Publish abstract only.)



59806

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Respondent-Appellee,) APPEAL FROM THE CIRCUIT
) COURT OF COOK COUNTY.
 vs.)
) HONORABLE RICHARD J. FITZGERALD,
 CHARLES McKINNEY,) Presiding.
)
 Petitioner-Appellant.)

PER CURIAM:

Before STAMOS, LEIGHTON and HAYES, JJ.

Charles McKinney (petitioner) entered pleas of guilty to four indictments charging multiple offenses of armed robbery and aggravated battery, in violation of Sections 18-2 and 12-4 of the Criminal Code. (Ill. Rev. Stat. 1971, ch. 38, pars. 18-2, 12-4.) He was sentenced to concurrent terms of four years to eight years; no appeal was taken from the judgments entered thereon.

Petitioner thereafter filed a pro se petition, pursuant to the Illinois Post-Conviction Hearing Act, alleging a violation of Supreme Court Rule 402 during the change of plea proceedings. (Ill. Rev. Stat. 1973, ch. 38, par. 122-1 et seq.; ch. 110A, par. 402.) On motion of the State, the unamended pro se petition was dismissed without an evidentiary hearing. Petitioner appeals, contending that the trial court erred in dismissing the petition since the record discloses that the court which accepted his pleas of guilty failed to confirm the terms of the plea agreement and failed also to indicate its position on the terms of the agreement, as required by Supreme Court Rule 402 and in violation of his constitutional rights under Boykin v. Alabama, 395 U.S. 238; he also contends that he was denied effective assistance of counsel below inasmuch as his counsel failed to raise those two matters by an amended post-conviction petition.

The pleas of guilty were entered on March 1, 1972. On February 8, 1973, petitioner filed the instant post-conviction petition, alleging a violation of his constitutional rights in that the terms of his plea agreement had not been spread of record as required by Supreme Court Rule 402(b). Petitioner's appointed counsel, pursuant to Supreme Court Rule 651(c) (Ill. Rev. Stat. 1973, ch. 110A, par. 651(c)), filed a certificate stating that he conferred with petitioner by mail and in person, that he reviewed the record in the change of plea proceedings, and that he also reviewed the pro se post-conviction petition; counsel concluded that the pro se petition adequately and fully stated all matters which could be raised in the post-conviction proceedings. (See also People v. Slaughter, 39 Ill.2d 278, 235 N.E.2d 566.) The State's motion to dismiss the post-conviction petition, on grounds that no constitutional issues had been presented therein, or if presented therein they required no evidentiary hearing, was accompanied by a copy of the transcript taken at the change of plea hearing.

The transcript of the change of plea hearing discloses that the trial court extensively admonished the petitioner as to his constitutional rights in the matter. Lacking, however, was a statement by the trial court confirming the terms of the plea agreement and a colloquy with the petitioner in that regard; the trial court also did not indicate its own reaction to the terms of the plea agreement. It does appear, however, that petitioner's trial counsel had represented to the court that he had advised the petitioner of the results of the plea conference and that a sentence of four years to eight years had been proposed. After petitioner's pleas of guilty were accepted by the trial court and sentence was imposed as above indicated, the trial court advised petitioner of his right to appeal the judgments thus entered; no appeal was taken therefrom.

Petitioner correctly contends on this appeal that Supreme Court Rule 402 is designed to comply with the requirements of the Boykin decision and to further "give visibility" to the plea agreement. (See Smith-Hurd Ann. Stat. 1971, Committee Comments, ch. 110A, §402.) The Boykin decision requires that the record affirmatively demonstrate that a plea of guilty has been knowingly and understandingly made. While failure to cause the plea agreement to be spread of record in a change of plea proceeding, or to confirm the terms thereof, may constitute error cognizable in a direct appeal from a judgment based upon the plea of guilty (see, e.g., People v. Ridley, 5 Ill.App.3d 680, 284 N.E.2d 37), that failure does not necessarily constitute a violation of a defendant's constitutional rights under the Boykin decision. (See People v. Dudley, 58 Ill.2d 57, 316 N.E.2d 773; People v. Krantz, 58 Ill.2d 187, 191, 194, 317 N.E.2d 559.) Petitioner has not demonstrated in what manner, nor has he as much as alleged that, the error committed by the court in the change of plea proceedings (in failing to confirm the terms of the plea agreement and to question him relative thereto), has in any manner worked to his prejudice. Moreover, he does not claim that the pleas of guilty were not knowingly and understandingly made, nor does he claim that he did not receive the sentence agreed upon at the plea negotiations. Further, the terms of the agreement and the fact that petitioner had been apprised thereof appear of record through his own counsel's statement thereof in open court. The violations of Rule 402 now advanced by petitioner as committed by the court at the change of plea proceedings are therefore not cognizable as grounds for relief under the Post-Conviction Hearing Act. The trial court properly dismissed the pro se post-conviction petition without an evidentiary hearing.

It therefore follows that since those grounds now alleged by petitioner on this appeal do not constitute grounds for relief

under the Act, his counsel at the post-conviction proceedings below could not have been guilty of incompetence in failing to amend the pro se petition to include those matters as grounds for relief.

For these reasons the judgment of the circuit court of Cook County, dismissing the pro se post-conviction petition without an evidentiary hearing, is affirmed.

JUDGMENT AFFIRMED.

PUBLISH ABSTRACT ONLY.

No. 60508)
60509)

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
LEE JOHNSON, JR.,	)	DAVID J. SHIELDS,
Defendant-Appellant.	)	JUDGE PRESIDING.

Before Downing, P.J., Stamos, and Hayes, JJ.

PER CURIAM

Lee Johnson, Jr., defendant, was found guilty after a bench trial of the crimes of attempt theft and battery. (Ill. Rev. Stat. 1973, ch. 38, pars. 8-4 and 12-3.) He was sentenced to a term of ninety days in the House of Correction on the charge of battery and one year probation with the condition that the first ninety days be served in the House of Correction on the charge of attempt theft, both sentences to run concurrently. Defendant appeals arguing that on the charge of battery the evidence was insufficient to establish beyond a reasonable doubt that he caused bodily harm to the complainant. On the charge of attempt theft defendant argues that the complaint was insufficient and that his sentence was improper under the Unified Code of Corrections.

The evidence adduced at trial is summarized. Kathy Flavin, a security guard for the Wieboldt's Department Store, Inc., testified that on June 24, 1973, at approximately 2:35 P.M., she observed the defendant in the store in Evanston, Illinois. Defendant removed a sport coat from the rack, folded it into four squares, covered it with a bag, and then attempted to leave the store. As the defendant approached the revolving doors of the store, Miss Flavin informed him that he was under arrest. Defendant pushed her against the counter and struck her in the arm and in the ribs with his fist. Defendant then dropped the coat and fled. As defendant ran down the aisle of the store, he knocked a young child to the floor. Defendant

ran out of the store and escaped. Subsequently Miss Flavin viewed approximately ten photographs and identified a photograph of the defendant. Defendant was arrested on July 18, 1973.

The defendant, defendant's mother and defendant's father all testified that on June 24, 1973, between 10:30 A.M. and 6:00 P.M., defendant was in the family home and did not at any time leave.

Defendant's first contention on appeal is that the evidence was insufficient to establish beyond a reasonable doubt that he caused bodily harm to the complainant. In People v. Claudio, 13 Ill. App. 3d 537, 300 N.E.2d 791, this court held that the testimony of a police officer that he was kicked by the defendant was sufficient to establish that the defendant had caused him bodily harm. Similarly, in People v. Smith, ___ Ill. App. 3d ___, ___ N.E.2d ___ (No. 59964, decided October 11, 1974), this court held that the testimony of a police officer that the defendant struck him in the face with her fist was sufficient to establish bodily harm.

In the case at bar, the testimony of Kathy Flavin established that she was a security guard for Wieboldt's Department Store. On June 24, 1973, she observed the defendant remove a coat from the rack and attempt to leave the store without paying for the coat. When she sought to stop the defendant, he threw her up against the counter and struck her in the arm and the ribs with his fist. These facts were sufficient for the trial court reasonably to infer that Kathy Flavin suffered bodily harm when she was struck by the defendant.

Defendant's next contention on appeal is that the complaint charging him with attempt theft was defective in that it failed to allege ownership of the property in question and failed to allege that the property was taken from an entity which at law is capable of owning property. In People v. Lonzo, 59 Ill. 2d 115, ___ N.E.2d ___, the defendant was convicted of

attempt theft. On appeal, defendant argued that the complaint charging him with attempt theft was fatally defective in that it did not properly allege ownership of the property involved. The complaint alleged that on August 29, 1972, at 55 West Chestnut Shreet, Chicago, Illinois, defendant

"[C]ommitted the offense of Attempt in that with intent to commit the offense of theft, attempted to exert unauthorized control over bicycles in a bicycle storage cage, and permanently deprive the owners of those bicycles of their use and benefit."
(59 Ill. 2d at 116.)

The supreme court held this complaint sufficient noting that the particularity required in a complaint charging a completed offense is not required in a complaint charging an attempt.

In the case at bar, the complaint filed against defendant charged that he

"[O]n or about June 24, 1973 at 1007 Church St. Evanston Illinois committed the offense of Attempt Theft in that he with intent to commit the offense of Theft attempted to leave Wieboldt's Dept. Store 1007 Church St. Evanston Illinois with a green sports coat valued at \$25.00."

This complaint adequately stated the elements of the offense of attempt theft and was sufficient to charge the defendant with that offense.

Defendant's final contention on appeal is that his sentence of one year probation with the condition that the first ninety days be served in the House of Correction on the charge of attempt theft is improper under the Unified Code of Corrections. Since defendant's case has not yet reached the stage of a final adjudication, the Unified Code of Corrections is applicable. (People v. Harvey, 53 Ill. 2d 585, 294 N.E.2d 269.) The Code as originally enacted provided that when a defendant is placed on probation, he can be committed to a period of imprisonment only under Article VII. (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-6-3(d).) Article VII of the Unified Code of Corrections provides only for periodic imprisonment. (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-7-1.) While the Unified Code of Corrections has now been amended to provide for imprisonment as a condition of probation for a period up to six months (Ill. Rev. Stat. 1973, ch. 38,

par. 1005-6-3(d)), this provision was not effective until July 1, 1974, after defendant was sentenced in the case at bar. The condition that defendant spend the first ninety days in the House of Correction on the charge of attempt theft is improper and must be vacated.

Accordingly, defendant's sentence on the charge of attempt theft is modified by eliminating the condition that he serve the first ninety days in the House of Correction, and as modified, the judgments of the circuit court of Cook County are affirmed.

Sentence modified;
Judgments affirmed.

(Publish abstract only.)

59194



25 I.A. 604^{3D}

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
v.	)	OF COOK COUNTY.
)	
LARRY WILLIAMS,	)	HONORABLE
	)	JAMES M. BAILEY,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM (First Division, First District).

Before Burke, P.J., GOLDBERG and EGAN, JJ.

Larry Williams, defendant, was found guilty after a jury trial of the crime of unlawful use of weapons. (Ill.Rev.Stat. 1971, ch. 38, sec. 24-1(a)(7).) He was sentenced to a term of one to three years. Defendant argues that his guilt was not established beyond a reasonable doubt because the identification testimony was insufficient and that he was denied a fair trial by the testimony of two prosecution witnesses that they had a conversation with an unidentified woman.

At trial, Chicago Police Officers Wayne Raschke and Robert Fitzgibbons testified that on January 7, 1972, at approximately 11:55 p.m., they received a radio call, pursuant to which they went to 744 East Bowen, Chicago, Illinois. They entered the building at that address and started to go up the stairs to the second floor. At that time they observed the defendant and a second man standing at the top of the stairway. There was a bare 100-watt light bulb hanging directly over where the men were standing. Officer Fitzgibbons ordered the men to halt. At that time defendant turned and faced the officers for approximately five seconds. Defendant was holding a sawed-off shotgun in his right hand. Defendant then ran down the hallway toward the rear of the building, with the officers in pursuit. There were additional bare light bulbs hanging on the stairwell and on each side of the hallway. As the defendant ran down the hallway, he looked over his shoulder to see

if the officers were pursuing him. Defendant ran onto the fire escape and threw the sawed-off shotgun into the yard. While Officer Raschke went into the yard, where he recovered a loaded blue steel sawed-off shotgun, Officer Fitzgibbons followed the defendant to the third floor, where defendant escaped. Both officers then returned to the second floor of the building, where they met a female Negro, with whom they had a conversation. Pursuant to that conversation, the officers proceeded to apartment 217. After being admitted by a young woman, they observed the defendant lying on a bed in the bedroom of the apartment. Defendant was then placed under arrest.

Carolyn Washington testified that the defendant is her boyfriend and the father of her three children. On January 7, 1972, the defendant arrived in her apartment, Number 217 at 744 East Bowen, Chicago, Illinois, in the morning hours. She returned to her apartment sometime in the afternoon. Miss Washington testified that the defendant was in her constant company from the time she returned to her apartment until the police officers entered her apartment and placed defendant under arrest.

The defendant testified that Carolyn Washington is his girlfriend. On January 7, 1972, he arrived at her apartment in the early morning hours. Defendant stated that he did not at any time leave her apartment until the police entered and arrested him at approximately midnight.

Defendant's first contention is that his guilt was not established beyond a reasonable doubt because the identification testimony was insufficient. This court has often stated the rule that in a jury trial credibility of witnesses is for the trier of fact to determine and that determination will not be disturbed on review unless it is based on evidence which is so unsatisfactory as to raise a reasonable doubt as to defendant's guilt. (People v. Riles, 10 Ill.App.3d 772, 295 N.E.2d 234.) The positive

identification of a defendant by one witness is sufficient to sustain a conviction even though contradicted by the accused. People v. Bennett, 9 Ill.App.3d 1021, 293 N.E.2d 687.

Both officers had an opportunity to observe defendant's face for approximately five seconds. There was a light bulb directly over the defendant's head, as well as other lights on the stairwell and in the hallway to either side of the defendant. Thereafter, the defendant ran down the hallway with the officers in pursuit. As defendant proceeded down the hallway, which was lit by approximately three light bulbs, defendant turned his head facing the officers, to see if they were following. While defendant argues that the officers did not have a sufficient period of time so as to observe defendant, in criminal offenses it is for the trier of fact to make the initial determination as to whether or not the officers had a sufficient period of time to observe the defendant so as to fix his identity. This court has upheld identifications similar to that in this case. (People v. Wright, 10 Ill.App.3d 1035, 295 N.E.2d 510.) Here, the trier of fact determined that the two police officers did have a sufficient period of time to view the defendant so as to fix his identity. After a complete review of the entire record, we cannot say that that determination is erroneous.

Defendant's second contention is that he was denied a fair trial when Officers Raschke and Fitzgibbons testified that they had a conversation with an unidentified woman on the second floor of the building and thereafter proceeded to apartment 217. Defendant argues that this testimony was both hearsay and improper corroboration for the identification of the defendant. Testimony that an out-of-court conversation took place does not constitute hearsay evidence where the substance of such conversation is not introduced into evidence. (People v. Carpenter,

28 Ill.2d 116, 190 N.E.2d 738.) It is perfectly proper for a police officer to testify that an out-of-court conversation occurred and to his subsequent conduct because both are within his personal knowledge and competent as evidence of the officer's investigatory procedure. People v. Coleman, 17 Ill.App.3d 421, 308 N.E.2d 364.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.



30
25 I.A. 605

59326

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
v.	)	OF COOK COUNTY.
)	
JERRY NEW,	)	HONORABLE
	)	BENJAMIN MACKOFF,
	)	PRESIDING.
Defendant-Appellant.)	

PER CURIAM (First Division, First District).

Before BURKE, P.J., GOLDBERG and EGAN, JJ.

Jerry New, defendant, was charged by indictment with the crimes of rape and armed robbery (Ill.Rev.Stat. 1971, ch. 38, secs. 11-1, 18-2). On May 31, 1973, defendant entered a negotiated plea of guilty and was sentenced to a term of seven to twenty-one years on each charge, the sentences to run concurrently. Defendant appeals, arguing that the trial judge in accepting his plea of guilty failed to admonish him as to the nature of the charge.

On May 31, 1973, when defendant's case was called, defense counsel requested a pre-trial conference with the court. After defendant was advised as to what a pre-trial conference entailed, the conference was held. When defendant's case was recalled, defense counsel in defendant's presence advised the trial judge that defendant wished to enter a plea of guilty to the crimes of rape and armed robbery. The trial judge advised the defendant that by entering a plea of guilty he would automatically waive his right to a trial by jury, his right to remain silent, and his right to require the State to prove him guilty beyond a reasonable doubt. Defendant stated that no threats or promises had been made to him to induce his plea of guilty. The trial judge advised the defendant that the indictment charged him with the crimes of rape and robbery. Defendant was admonished as to the possible statutory penalties for the crimes of rape and armed robbery under the law in effect at the time of the commission of the crimes and under

the Unified Code of Corrections. Defendant stated that he understood that there had been a pre-trial conference and that upon a plea of guilty the State would recommend a sentence of not less than seven nor more than twenty-one years on each charge. Defendant elected to be sentenced under the law in effect at the time of the commission of the crime on the charge of armed robbery and under the Unified Code of Corrections on the charge of rape. The facts which provided the basis for the indictment were then stipulated to by the parties. The assistant State's attorney in stating the stipulated facts specifically stated that the indictment charged the defendant with the crimes of rape and armed robbery. Defendant persisted in his plea of guilty which was then accepted by the trial court.

Defendant's only argument on appeal is that the trial judge in accepting his plea of guilty failed to admonish him as to the nature of the charge pursuant to Supreme Court Rule 402 (Ill.Rev.Stat. 1971, ch. 110A, sec. 402). The rule that a defendant must be advised as to the nature of the charge does not require the trial judge to recite all the facts which constitute the offense. The admonition of the crime by name is sufficient to apprise the defendant of the nature of the crime charged. People v. Krantz, 58 Ill.2d 187, 317 N.E.2d 559; People v. Carrion, 21 Ill.App.3d 195, 315 N.E.2d 251; People v. Tennyson, 9 Ill.App.3d 329, 292 N.E.2d 223; People v. Wintersmith, 9 Ill.App.3d 327, 292 N.E.2d 220; People v. Rosado, 2 Ill.App.3d 231, 276 N.E.2d 473; People v. Palmer, 1 Ill.App.3d 492, 274 N.E.2d 910; People v. Carter, 107 Ill.App.2d 474, 246 N.E.2d 320; People v. Harden, 78 Ill.App.2d 431, 222 N.E.2d 693.

In the case at bar, defendant entered a negotiated plea of guilty only after a pre-trial conference with the court. Defense counsel in defendant's presence informed the trial judge that defendant wished to enter a plea of guilty to the crimes of rape and armed robbery. Thereafter in admonishing the defendant, the

trial judge specifically informed the defendant that the indictment charged him with the crimes of rape and armed robbery. Defendant was also advised as to the possible statutory penalties for the crimes of rape and armed robbery under the law in effect at the time the crimes were committed and under the Unified Code of Corrections. Defendant indicated a knowledge of the crimes by electing to be sentenced by the law in effect at the time of the commission of the crime on the robbery charge and under the Unified Code of Corrections on the rape charge. The record of defendant's plea of guilty demonstrates that defendant was properly admonished as to the nature of the charges against him.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

60579



3D
25 I.A. 614

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT
	)	OF COOK COUNTY.
v.)	
	)	HONORABLE
JAMES SHELBY,	)	DANIEL J. WHITE,
	)	PRESIDING.
Defendant-Appellant.)	

PER CURIAM (First Division, First District).

Before BURKE, P.J., GOLDBERG and EGAN, JJ.

James Shelby (defendant) was found guilty after a bench trial of the offense of battery, in violation of Section 12-3 of the Criminal Code, and was sentenced to a term of four months in the House of Correction. (Ill.Rev.Stat. 1973, ch. 38, sec. 12-3.) On appeal he contends that he did not knowingly and understandingly waive his right to a trial by jury.

The facts briefly stated are, on September 25, 1973, the complaining witness was a passenger aboard a bus on the southwest side of Chicago while the person with whom he had been seated was being beaten by a group of youths. That person requested his aid, after which the defendant began shouting epithets and other language in the bus concerning the complaining witness and the bus driver. As the complaining witness descended the stairs to alight from the bus through the rear door, the defendant kicked him in the back, neck, ribs and shoulder, resulting in a sore rib and a sore shoulder. The police were immediately summoned and arrested the defendant. Defendant denied assaulting the complaining witness, stating that there had been a general altercation aboard the bus, that "feet were flying," that defendant was nearest the complaining witness at the time the latter noticed him, and that the complaining witness was kicked by someone other than the defendant. At the close of the evidence the trial court found defendant guilty of battery and not guilty of an accompanying charge of disorderly conduct.

When the case was called for trial on the day following the date of the incident, the court advised defendant as to the nature of the charges against him and asked him if he was ready for trial; after defendant indicated that he was ready for trial, the court advised him that he had a right to a continuance and to a bond, to which defendant replied that he was in the service and that he did not think that he could make a continuance. The case was thereupon passed to afford the defendant an opportunity to speak to the assistant public defender assigned to the case, which was expressly agreeable to the defendant.

When the case was later recalled the following colloquy occurred:

"THE CLERK: James Shelby, Richard Witczak, complainant.

"THE COURT: State is ready, is that correct?

"MR. CALLUM: Yes, your Honor.

"THE COURT: Mr. Shelby, you talked to the attorney appointed to represent you, the public defender?

"THE DEFENDANT: Yes, sir.

"THE COURT: Are you satisfied with having him represent you?

"THE DEFENDANT: Yes, sir.

"THE COURT: You are charged with disorderly conduct. Are you aware of what you are charged with?

"THE DEFENDANT: Yes, sir.

"THE COURT: Are you ready for trial on that charge?

"THE DEFENDANT: Yes, sir.

"THE COURT: How do you plead on that charge?

"THE DEFENDANT: Not guilty.

"THE COURT: You have a right to have your case heard by a jury.

Do you wish to have a jury hear your case?

"THE DEFENDANT: No, sir.

"THE COURT: You are also charged with battery, knowingly, without legal justification, kicking Witczak in the back while he was emerging from the CTA bus. Do you understand that charge?

"THE DEFENDANT: Yes.

"THE COURT: Are you ready for trial on that charge?

"THE DEFENDANT: Yes, sir.

"THE COURT: How do you plead?

"THE DEFENDANT: Not guilty.

"THE COURT: You have a right to have your case heard by a jury. Do you wish to have a jury hear that case?

"THE DEFENDANT: No, sir.

"THE COURT: Your answer is what?

"THE DEFENDANT: No, sir.

"(Witnesses sworn.)"

No specific formula has been developed for determining whether an accused has understandingly and knowingly waived his right to a trial by jury; each case must be decided upon its own peculiar facts. (People v. Richardson, 32 Ill.2d 497, 207 N.E.2d 453; People v. Sivals, 14 Ill.App.3d 453, 302 N.E.2d 659.) A case factually identical to the instant circumstances is People v. Luciw, 19 Ill.App.3d 802, 313 N.E.2d 227 (Abst.). In Luciw, as here, the case was passed to afford the accused an opportunity to speak with appointed counsel, after which the accused personally and without hesitation responded to court questioning demonstrating a knowing and understanding waiver of his right to a trial by jury. Further, it is to be noted that defendant here was not unfamiliar with criminal procedure in this State, having been convicted of criminal offenses in the past. (See People v. Johnson, 18 Ill.App.3d 993, 310 N.E.2d 746 (Abst.).) The instant record amply demonstrates that defendant knowingly and understandingly waived his right to a jury trial.

The cases cited by defendant in support of his position are distinguishable on their facts from the instant circumstances. See

e.g., People v. Murrell, 20 Ill.App.3d 789, 314 N.E.2d 467 (leave to appeal allowed, Supreme Court, No. 46849, September Term, 1974); People v. Bell, 104 Ill.App.2d 479, 244 N.E.2d 321.

For these reasons the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.



NO. 59943



3D
25 I.A. 615

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
ROGER BLAKELY (Impleaded),	)	HONORABLE
	)	ROBERT J. COLLINS,
	)	JOSEPH A. POWERS,
Defendant-Appellant.	)	PRESIDING.

BEFORE DOWNING, P.J., LEIGHTON and HAYES, JJ:

Per Curiam

Roger Lee Blakely (defendant) was charged with Lucious Gregg by Indictment #70-3665 with two counts of armed robbery, in violation of section 18-2 of the Criminal Code; under the name of "Rogers Blakeley," defendant was alone further charged by Indictment #70-3733 with the offense of unlawful possession of narcotics (marijuana), in violation of section 22-3 of the Criminal Code. (Ill. Rev. Stat. 1969, ch. 38, par. 18-2; Ill. Rev. Stat. 1967, ch. 38, par. 22-3.) Defendant entered pleas of guilty to all charges on March 16, 1971, and was placed on probation for concurrent terms of five years, the first year to be served in the county jail. Defendant's probation was revoked on May 22, 1973, on the grounds that he had violated certain conditions of the probation and he was sentenced to concurrent terms of two years to six years on the two indictments. Defendant appeals. (Lucious Gregg was found guilty by a jury and sentenced, and his conviction, as modified, was affirmed by this court in People v. Gregg (1973), 13 Ill. App. 3d 242, 300 N. E. 2d 494. Gregg is not involved in this appeal.)

Defendant contends on appeal that he was denied due process of law during the revocation proceedings because (a) the revocation petition failed to allege the facts ultimately found to constitute the violation, (b) the State failed to prove the allegations of the petition, whereas the court's finding was based upon matters not therein alleged, and (c) the court improperly failed to admonish him pursuant to Supreme Court Rule 402 prior to his stipulation as to the violation. Defendant further contends that the sentence imposed was improper and excessive

because the sentencing judge was not familiar with the facts of the primary case; and that his conviction for possession of marijuana is void and must be reversed.

On June 6, 1972, the probation department made application for a warrant for defendant's arrest on the ground that he had been in violation of the conditions of his probation by failure to report to his probation officer and by failure to appear in Branch 57 of the court on March 16, 1972, in connection with cases 72-MC-940423 and 72-MC-940424, which cases charged him with possession of heroin and possession of hypodermic needle, resulting in a bond forfeiture and a re-scheduling of the hearing on those cases to June 14, 1972. The rule to show cause was issued on July 28, 1972, the petition alleging the foregoing matters and further alleging that defendant had failed to appear at the re-scheduled court date on June 14, 1972, and that he was taken into custody on the probation violation warrant on July 25, 1972.

Hearing on the revocation petition was continued from time to time on motions of defendant, of the State, and by agreement, and on May 22, 1973, the State was permitted to file a supplemental revocation report, and hearing was set for the same day. The supplemental report alleged only that on January 30, 1973, a hearing was held on the rule and was continued to March 19, 1973, to await disposition of the "case pending in the Municipal Court" and that on March 15, 1973, defendant appeared in Branch 57 of the Municipal Court charged with a violation of "Chapter 56-1/2, 1402 and Chapter #38, Section ----5, cases #72-MC-940423-24 and both cases were continued to May 7, 1973."

At the May 22nd hearing defense counsel acknowledged receipt of the supplemental report, after which the assistant State's attorney orally disclosed to the court that as a result of May 7, 1973 court date in Branch 57, "the defendant was found guilty on the two charges, the controlled substance charges, and was sentenced to nine months in the House of Correction. That does not appear on your supplementary report. He is currently serving time on these charges." The court criticized the supplemental report as containing "rather meager" information. Defense counsel thereupon stated to the court that defendant "has no contest" with the matters stated by the assistant State's attorney and stipulated that defendant is "the person

so convicted." It was then noted by the court that the original report alleged that cases 72-MC-940423 and 940424 charged defendant with possession of heroin and hypodermic needles, whereas counsel now represents to the court that the conviction was for barbiturates. The defendant's probation was thereupon terminated based upon the stipulation, and the matter was continued for sentencing, the court admonishing the State to clear up the discrepancy between the heroin charge and the barbiturate conviction in the interim. Prior to the date of the sentencing hearing defendant moved for and was allowed a substitution of judges in that regard.

Sentencing took place on July 27, 1973, at which time the State was again permitted to file an amended supplemental revocation report in support of the rule to show cause, a copy of which was received by defense counsel at the onset of the hearing on that date. The amended report re-alleged the allegations in the supplemental report and proceeded to detail the facts of the charge in 72-MC-940423 of which defendant was convicted in May, 1973 and sentenced to nine months in the House of Correction; those details relate to a narcotics possession offense which ostensibly occurred June 4, 1972, in the presence of two police officers, whereupon an immediate arrest was effected. A hearing was held in aggravation and mitigation on July 27, 1973; defendant chose to be sentenced under the provisions of the Criminal Code in effect at the time of the commission of the primary offenses; and he was sentenced to concurrent terms of two years to six years.

Defendant contends that he received no notice of the grounds upon which his probation was revoked because the violation detailed in the amended supplemental report was not the same charge to which the case numbers in the original and the supplemental reports related, and that he therefore could not have knowingly and understandingly stipulated to a violation of probation based thereon nor did he have opportunity to adequately prepare a defense thereto.

Without question, the procedures and the pleadings employed by the State in the probation revocation proceedings ~~leave~~ much to be desired.

The original notice of violation was based upon defendant's failure to report to his probation officer and upon a bail bond offense relating to cases 72-MC-940423 and 940424. The supplemental report sought to designate as grounds for the revocation the substantive offenses charged in those case numbers, without alleging defendant's conviction thereon nor any specifics relating thereto, as expressly noted by the trial court; instead of filing an up-to-date supplemental report, which could have been accomplished since some three weeks had elapsed between the date of the conviction and the date of the hearing on the supplemental report, the State chose to "update" the supplemental report through oral statements at that hearing. Finally, when the State did ultimately file an amended supplemental report, the violation detailed therein did not correspond to the violation alleged in the original and the supplemental reports.

However, it appears that defendant was afforded ample notice of the grounds alleged by the State in support of the revocation petition, through the supplemental report and the oral "update" thereof at the May 22nd hearing. Defense counsel was served with a copy of the supplemental report at the May 22nd hearing; he was present at that hearing with defendant while the State orally updated the report. Although the court expressly commented as to the "meager" nature of the information tendered as to the grounds alleged as a violation of defendant's probation, defendant made no objection in that regard nor did he object to the State's method of supplementing the supplemental report; further, defendant made no request for additional time to look into the newly alleged matters, although the record discloses that defendant and his counsel had been conferring relative to those matters during the hearing. Thus, however unorthodox and unspecific were the procedures and pleadings adopted and filed by the State herein, it appears from the record that defendant voluntarily chose to stipulate to the violation of probation charged rather than to afford himself of the clear opportunities to object thereto or to request additional time for preparation of a defense. Consequently, the fact that the amended supplemental report detailed an offense differing from that to which he had stipulated

is immaterial; probation had already been revoked based upon such stipulation voluntarily entered that he was "the person so convicted" and upon adequate notice. Failure to give notice to a probationer of the charges upon which his probation is sought to be revoked prior to the date of the hearing thereon does not necessarily constitute a denial of due process of law. See e.g., People v. Weeks (1974), ___ Ill. App. 3d ___, ___ N. E. 2d ___ (#59907, First District, 11/7/74.) Defendant cannot now be heard to complain.

Defendant further argues that the State failed to prove the allegations of which defendant had notice, but, in the alternative, that the finding was based upon matters not alleged. His argument is based upon the position that his stipulation related to the convictions on two controlled substance charges, whereas the original revocation report was not based upon those charges; and that the evidence adduced as to such convictions constituted evidence of separate and distinct offenses to support the offenses charged in the original report.

Initially, we disagree with the State's position on appeal that the offense charged in the supplemental report was that detailed in the amended supplemental report, and that the continued allegation of the same case numbers throughout the three reports was due to a "clerical error" on the part of the probation department. From the colloquy at the hearing on the rule held on May 22, 1973, it clearly appears that the court and counsel for both parties proceeded upon the understanding that the allegations in the supplemental report related to the substantive charges to which the case numbers alleged in the original report related. At no time during that hearing did the State attempt to alter the understanding in that regard, if, as now claimed by the State, it had taken the position that the allegations in the supplemental report related to the offense detailed in the amended supplemental report. The State's current position is not supported by the record.

To answer defendant's contentions that the State failed to prove the allegations against him and that he was found in violation of his probation based upon charges not alleged against him, the supplemental report, as updated by the State at the hearing on the rule to show cause, related to

the substantive charges to which the case numbers alleged in the original report related. The violation of defendant's probation was established by his own voluntary stipulation to such charges. It was therefore unnecessary for the State to proceed further with evidence as to those charges or as to the other charges contained in the original report.

(People v. Tempel (1971), 131 Ill. App. 2d 955, 268 N. E. 2d 875; People v. Williams (1970), 130 Ill. App. 2d 192, 264 N. E. 2d 589.) It should also be noted, in response to a subsidiary claim made by defendant, that the State is not required to rely solely upon the grounds as alleged in an initial report for revocation; additional grounds may be alleged and proven subsequent to the original report, upon due notice to the probationer. See People v. Weeks, supra.

Defendant also claims that he was denied due process of law because the trial court improperly failed to admonish him pursuant to Supreme Court Rule 402 prior to his stipulating to the violation charged. Defendant cites People v. Pier (1972), 51 Ill. 2d 96, 281 N. E. 2d 289, as authority for such position.

This court has consistently held that Supreme Court Rule 402, relating to pleas of guilty, is not applicable, as such, to revocation of probation proceedings wherein the probationer stipulates or otherwise admits to the violation charged. See People v. Beard (1973), 15 Ill. App. 3d 663, 304 N. E. 2d 707; People v. Smith (1974), 20 Ill. App. 3d 793, 314 N. E. 2d 510; People v. Hall (1974), 17 Ill. App. 3d 477, 308 N. E. 2d 235 (lv. to App. Den.).

Defendant further contends that the judge who imposed sentence upon him was unfamiliar with the circumstances of the offenses to which defendant had originally pleaded guilty, since he was not the same judge who accepted those pleas, and that therefore the sentence imposed of two years to six years is improper and excessive.

Defendant expressly chose to be sentenced under the Criminal Code provisions in effect at the time of the commission of the offenses of which he was convicted rather than those in existence at the time of sentencing therefor. The statute under which he was sentenced carried a minimum term

of two years imprisonment for armed robbery. (Ill. Rev. Stat. 1969, ch. 38, par. 18-2.) As such, defendant has been sentenced to the lowest minimum term which could be imposed upon him.

Defendant is correct in stating that the court should take into consideration at the time of sentencing the circumstances of the offense of which a defendant stands convicted. (People v. Fields (1972), 8 Ill. App. 3d 1045, 291 N. E. 2d 258; Ill. Rev. Stat. 1973, ch. 38, par. 1005-4-1.) The record discloses that defendant was twice asked by the court prior to sentencing what evidence he would offer in mitigation of the offenses, yet defendant failed to offer any fact connected with the offenses in that regard. Assuming without deciding that the court, upon its own motion, should have considered the circumstances surrounding the offenses and that its failure to do so constituted error, the sole remedy available to defendant under the circumstances would be remandment of the case for a re-consideration of such facts and, if otherwise warranted, a reduction in the maximum term imposed. However, in light of the fact that defendant was found guilty of two armed robberies and in light of the record disclosed by the presentence report available to the judge at the time of sentencing, the maximum term of six years as imposed is not excessive; a re-consideration of the maximum term in light of the facts of the offenses would therefore be pointless.

Finally, we are in agreement with defendant's position that his conviction for unlawful possession of marijuana is void and that that judgment must be vacated. The State argues that defendant should be barred from now raising that question, since he failed to raise it within the proper statutory time after the finding of guilty and the imposition of the probation.

Defendant was found guilty of unlawful possession of marijuana, in violation of section 22-3 of the Criminal Code of 1967, prior to the date that that section of the Code was declared void by the Supreme Court in People v. McCabe (1971), 49 Ill. 2d 338, 275 N. E. 2d 407. In the case of People v. Sarelli (1973), 55 Ill. 2d 169, 302 N. E. 2d 317, the defendant was also found guilty of a like offense prior to the holding in McCabe and failed to raise that contention in his direct appeal; the Supreme Court in

Sarelli permitted defendant to raise such contention thereafter in post-conviction proceedings, in the interest of "justice and fairness", and held the conviction void based upon McCabe. Likewise, in the instant case, the statute under which defendant was found guilty of the marijuana offense has been declared void and in the interest of "justice and fairness" defendant's conviction based thereon must be declared void.

For the foregoing reasons, that part of the judgment of the circuit court of Cook County revoking defendant's probation and imposing concurrent sentences of two years to six years upon the offenses of armed robbery as charged in Indictment #70-3665 is affirmed. The conviction for the offense of unlawful possession of narcotics (marijuana) as charged in Indictment #70-3733 is vacated.

Judgment affirmed in part
and vacated in part.

Abstract only.

1-21-15
And then
2d floor



3D
25 I.A. 658

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT,
Plaintiff-Appellee,	)	COOK COUNTY.
)	
v.)	
)	
ERNEST OUSLEY,	)	HONORABLE
	)	JACK A. WELFELD,
Defendant-Appellant.	)	PRESIDING.

Mr. JUSTICE JOHNSON delivered the opinion of the court:

After a bench trial, Ernest Ousley was convicted of theft and sentenced to 6 months in the House of Correction. On appeal, the sole issue urged by the defendant is that the trial judge violated his right to due process by improperly taking judicial notice of a fact not in the record. We affirm.

Mr. Piper, the State's first witness and a security guard at Goldblatt Brothers, Incorporated, testified that on August 19, 1973, at approximately 12:40 P.M., the defendant entered the store from the west door. He proceeded to the ladies lingerie department, opened a drawer, and removed three boxes of women's half slips. Shortly thereafter, Mr. Piper apprehended the defendant outside the Racine Avenue door, with the previously mentioned garments in his possession.

Ann Williams was the second witness called by the State. She testified that she worked for Goldblatt's in the capacity of an "operator." She also testified that Goldblatt's is an Illinois corporation. Finally, in completing her testimony, the witness stated that she had been employed by Goldblatt's for 30 years.

Ousley argues that his right to due process was violated when the trial judge improperly took judicial notice of a fact based upon private knowledge not in the record before him. He questions the manner in which the State proved, with the testimony of Ann Williams, the corporate existence of Goldblatt Brothers, Incorporated. The defendant uses the following colloquy to support his position:

PROSECUTOR: Do you know of your own knowledge whether Goldblatt Brothers is a corporation licensed to do business in the State of Illinois?

WITNESS: Yes.

MR. GAUGHAN (Defense Counsel): I object to this. This doesn't establish that Goldblatt Brothers is a corporation. Unless he establishes that she is a corporate officer or comes in with a certified copy of incorporation, that's it.

WITNESS: I don't have that, I would have to bring it.

THE COURT: No, she doesn't have to bring in a certified copy.

MR. GAUGHAN: She has to be an officer of the corporation.

THE COURT: She can testify. She's been with Goldblatt Brothers. I have to take judicial notice, because she testified before me many, many times, I know she's been affiliated with Goldblatt Brothers.

PROSECUTOR: How long have you been with Goldblatt's ma'am?

WITNESS: Thirty years.

The defendant argues that the judicial notice doctrine was erroneously invoked when the trial judge took judicial notice of the witness' testimony in prior cases. In this way, he submits his constitutional rights were violated. The defendant relies on People v. Wallenberg (1962), 24 Ill. 2d 350, 181 N.E. 2d 143, and People v. Vine (1972), 7 Ill. App. 3d 515, 288 N.E. 2d 69, as support for his position.

The State, in a prosecution for theft, must allege and prove ownership or some form of possessory interest by one other than the defendant. (People v. Thomas (1972), 9 Ill. App. 3d 384, 292 N.E. 2d 153; People v. Roach (1971), 1 Ill. App. 3d 876, 275 N.E. 2d 309.) Where the prosecution asserts that the owner is a corporation, the legal existence of the corporation is a material element which must be proved. People v. Gordon (1955), 5 Ill. 2d 91, 125 N.E. 2d 73.

A court may take judicial notice of whatever may be known by common observation, since a court is presumed to be as well in-

informed as the general public and can certainly take judicial notice of that which everyone knows to be true. (People v. Taylor (1968), 95 Ill. App. 2d 130, 237 N.E. 2d 797.) The list of things covered by the doctrine is constantly expanding and no exact limit can be placed thereon. 31 C.J.S. Evidence § 7.

In People v. McGuire (1966), 35 Ill. 2d 219, 220 N.E. 2d 447, the Illinois Supreme Court, when considering the question of whether direct parol testimony may be used to establish corporate existence, stated at page 232:

"* * * [I]n the absence of evidence to the contrary, the existence of a corporation may be shown by the direct oral testimony of a person with knowledge of that fact."

Ann Williams, the witness in the case under review whose testimony was admitted over objection, was a 30-year employee of Goldblatt Brothers. She could certainly be considered by the judge, given her years of service, to be a person that had knowledge of the corporate status of Goldblatt's. Furthermore, the defendant offered no evidence to the contrary.

Coupled with Ann Williams' testimony was that of Mr. Piper, a security guard. He also testified that Goldblatt's was a corporation. In People v. Nelson (1970), 124 Ill. App. 2d 280, 260 N.E. 2d 251, the court held that testimony of one who was on duty as a security officer for "Sears and Roebuck," and references in his testimony and in that of others, including one of the defendants, to "Sears," "Sears and Roebuck," "Sears Corporation," "Sears Warehouse," and "Sears Distribution Center at 2065 George Street in Melrose Park" was sufficient to prove the existence of Sears, Roebuck as a corporation and its ownership of the property burglarized. A similar conclusion was reached in People v. Jones (1972), 7 Ill. App. 3d 183, 287 N.E. 2d 206. Nelson has been followed by later cases that have been faced with this question, (see People v. Lewis (1974), 18 Ill. App. 3d 131, 309 N.E. 2d 349; People v. Ruiz

(1973), 15 Ill. App. 3d 1047, 305 N.E. 2d 653), and we see no need for deviating from that practice here.

Therefore, after reviewing the facts in the instant case, we hold that the defendant was not denied due process of law.

For the foregoing reasons, the judgment of the trial court is affirmed.

Affirmed.

BURMAN and ADESKO, JJ., concur.

Abstract only.



3D
25 I.A. 705

No. 59567

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)	
	)	COURT OF COOK COUNTY.
v.)	
	)	HONORABLE
MELVIN CHATMAN,	)	FRANK J. WILSON,
	)	PRESIDING.
Defendant-Appellant.)	

Before McGLOON, P.J., DEMPSEY and McNAMARA, JJ.

PER CURIAM:

On March 13, 1973, Melvin Chatman entered pleas of guilty to four indictments charging him with six counts of armed robbery of six different individuals committed on March 29, April 18 and May 5, 1971. Ill.Rev.Stat. 1971, ch.38, par.18-2. The trial court accepted the pleas and sentenced the defendant in accordance with a plea agreement to concurrent terms of not less than seven years nor more than seven years and one day on each of the six counts. He now appeals, contending that his pleas of guilty should be vacated because the trial judge did not, as required by Supreme Court Rule 402, specifically ask him if any force or threats or any promises, apart from the plea agreement, itself were used to obtain the plea. Ill.Rev.Stat. 1973, ch.110A, par.402(b).

The defendant was arraigned on July 21, 1971, and pretrial motions were filed and heard concerning discovery. Motions were heard to reduce his bond, a public defender was appointed and thereafter, a Chicago Bar Association attorney was substituted. Finally, on March 13, 1973, the defendant appeared in court with two attorneys representing him. The court first admonished the defendant concerning each of the six counts of armed robbery pending against him and informed the defendant that his lawyer had advised the court that he wished to withdraw his pleas of not guilty and to plead guilty; when asked, the defendant indicated that this was correct. The court further admonished the defendant that he was waiving his right to a jury trial and explained to the defendant what a jury trial was, that he was also waiving his right to confront the witnesses in the cases against him, and his

right against incriminating himself, and to each of these admonishments the defendant replied that he understood them. The court further admonished the defendant as to the possible sentences that might be imposed, from two years to life, and the fact that a \$10,000 fine might be imposed on each count and the defendant again indicated that he understood. The court further stated that at the request of the defendant's attorneys and at the defendant's own request, the court had entered into a conference with the assistant State's attorney and the defendant's attorneys and had determined at that conference that there was a factual basis for the pleas of guilty, that there was a full hearing in aggravation and mitigation at the conference relative to the defendant's background, including his prior criminal history, and work and family background and that the State had recommended a certain number of years and the court had indicated that upon a plea of guilty it would grant concurrent sentences of seven years to seven years and a day on each count. The court asked the defendant if his lawyer had explained this to him and he answered affirmatively and the court asked the defendant if he accepted this and the defendant answered, "Yes, sir."

The assistant State's attorney then indicated in each case the names of the witnesses that the State would call and he briefly summarized the facts relating to each of the six crimes committed by the defendant. The defendant, through his attorney, stipulated to this factual account and to the fact that his age was 34. The court stated it would accept the pleas of guilty and that there would be a finding of guilty of armed robbery on all counts on all indictments and entered judgment on the finding. The court then asked the defendant if he would waive the necessity of a pre-sentence investigation and he replied, "Yes, your Honor." The court further stated that it had been agreed at the conference that the defendant would be sentenced in compliance with the law in 1971 and not under the

Unified Code of Corrections and the defendant stated that was also correct. The State waived further aggravation and when asked for further mitigation, one of the defendant's attorneys said that the defendant wanted the court's permission to get married and asked the court to set a date for this to occur and for sufficient time. The court granted a stay of mittimus for this purpose, adding: "If he needs somebody to marry him I will be glad to. That was part of the conference." The court asked the defendant if he had anything to say before pronouncing sentence, and he indicated he did not, and after the court entered judgment and stayed the mittimus until April 12, the court added, "When you come back remind me if you have already been married and if not we will ask for a further stay," and the defendant then replied, "Thank you, sir."

The defendant asks this court to overrule its recent precedents, People v. Shepard (1973), 10 Ill.App.3d 739, 295 N.E.2d 310, and People v. Campbell (1973), 13 Ill.App.3d 237, 300 N.E.2d 568, and to adopt instead, contrary decisions from the Third District, People v. Hintze (1973), 14 Ill.App.3d 1077, 303 N.E.2d 22, and the Fifth District, People v. Barker (1973), 15 Ill.App.3d 104, 303 N.E.2d 512. He acknowledges that the First District precedents hold it is not reversible error for the trial judge to omit to inquire if any force or threats or promises, apart from the plea agreement, itself, were used to obtain the plea, so long as no question is raised concerning the voluntariness of the plea. We also note that the Second District has come to the same conclusion as the First District. People v. Ellis (1974), 16 Ill.App.3d 282, 306 N.E.2d 53.

We adhere to the previous decisions of this district and hold that the court's failure specifically to inquire of the defendant whether any threats or force or any promises, apart from the plea agreement itself, were used to obtain the

plea, was not error. Rule 402, by its terms, does not require that the judge specifically admonish the defendant on this point, but requires that the court "determine" whether any force or threats or other promises were used to obtain the plea. The record here shows the court did, as required by the rule, determine that the guilty plea was voluntary before accepting it. The trial court went to considerable lengths to determine that the plea was voluntary. As the court said in People v. Gratton (Second District, 1974), 20 Ill.App.3d 75, 311 N.E.2d 717, 719, under similar circumstances: "It is obvious under the lengthy discussion of the possible effects of the plea of guilty that no force or threats were used."

In People v. Dudley (September 17, 1974), 58 Ill.2d 57, 316 N.E.2d 773, and People v. Krantz (September 27, 1974), 58 Ill.2d 187, --N.E.2d--, the Supreme Court has again stated that Rule 402 calls for only "substantial compliance" with its requirements. The procedure followed in the trial court here did not constitute error and did constitute substantial compliance with Rule 402; but even if it was error, we think it was harmless error. In People v. Dudley, the court said that a failure to state and confirm the plea agreement there was not substantial compliance with Rule 402, and consequently error (citing People v. Ridley, 5 Ill.App.3d 680, 284 N.E.2d 37). However, it went on to say that it did not necessarily follow that such error would require reversal absent some claim that the defendant's plea "was not voluntary." The record here reflects sufficient facts to justify the court's conclusion that the plea was voluntarily made and that it was a result of the defendant's wishes, and not the result of force or threats or other promises apart from the plea agreement itself. The defendant, himself, thanked the judge at the conclusion of the plea agreement and his attitude toward the judge was obviously friendly. Considering all the circumstances, we agree with the trial court that the plea was voluntary. Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.



3D
25 I.A. 720

No. 60317

PEOPLE OF THE STATE OF ILLINOIS,)
Respondent-Appellee,) APPEAL FROM THE CIRCUIT
v.) COURT OF COOK COUNTY.
BRYAN COLDMAN,) HONORABLE
Petitioner-Appellant.) MARVIN E. ASPEN,
PRESIDING.

Before McGLOON, P.J., DEMPSEY and McNAMARA, JJ.

PER CURIAM:

Bryan Coldman, petitioner, appeals the dismissal of his post-conviction petition without an evidentiary hearing.

Petitioner was originally charged by two separate indictments with the crime of armed robbery. On June 14, 1972 petitioner entered a negotiated plea of guilty to each indictment and was sentenced to concurrent terms of five years to five years and one day. On October 10, 1972 petitioner filed a pro se post-conviction petition. Counsel was appointed to represent petitioner and a supplemental post-conviction petition was filed. That petition alleged that the trial judge in accepting the petitioner's plea of guilty failed to inform him of the nature of the charge pursuant to Supreme Court Rule 402 (Ill.Rev.Stat. 1971, ch.110A, par.402) and that petitioner was denied equal protection of law when at age 17 he was prosecuted as an adult, since a similarly situated female would have been prosecuted as a juvenile. Upon motion of the State, on October 22, 1973, petitioner's post-conviction petition was dismissed without an evidentiary hearing.

Petitioner appeals arguing that he was entitled to a post-conviction relief on the allegation in his post-conviction petition that the trial judge in accepting his plea of guilty failed to admonish him as to the nature of the charge as required by Supreme Court Rule 402. The rule that a defendant must be advised as to the nature of the charge does not require the trial judge to recite all the facts which constitute the offense. The admonition of the crime by name is sufficient to apprise the defendant of the nature of the crime charged. People v. Krantz (1974), 58 Ill.2d 187,

317 N.E.2d 559; People v. Carrion (1974), 21 Ill.App.3d 195, 315 N.E.2d 251; People v. Tennyson (1972), 9 Ill.App.3d 329, 292 N.E. 2d 223; People v. Wintersmith (1972), 9 Ill.App.3d 327, 292 N.E. 2d 220; People v. Rosado (1971), 2 Ill.App.3d 231, 276 N.E.2d 473; People v. Palmer (1971), 1 Ill.App.3d 492, 274 N.E.2d 910.

In the present case, petitioner entered his plea of guilty only after a pre-trial conference and with knowledge as to the exact sentence which he would receive. Prior to accepting petitioner's plea of guilty, the trial judge specifically advised him that he was charged in each indictment with the crime of armed robbery. Thereafter, the trial judge asked the petitioner if he understood the nature of the charges against him. Petitioner replied in the affirmative. These admonitions by the trial judge were sufficient to apprise petitioner of the nature of the charge.

Petitioner also argues that he was entitled to post-conviction relief on the allegation in his post-conviction petition that he was denied equal protection of the law when at age 17 he was treated as an adult since a similarly situated female would have been treated as a juvenile. The very contention petitioner now seeks to make has been recently rejected by the Illinois Supreme Court. People v. Ellis (1974), 57 Ill.2d 127, 311 N.E.2d 98.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.



3D
25 I.A. 734

No. 59646

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
)	
v.	)	COURT OF COOK COUNTY.
)	
MICHAEL WILLIAMS and RONALD	)	HONORABLE
WILLIAMS,	)	KENNETH E. WILSON,
	)	PRESIDING.
Defendants-Appellants.)	

MR. JUSTICE McNAMARA delivered the opinion of the court:

Defendants, Michael Williams and Ronald Williams, were charged with the armed robbery of an unknown amount of cash and food stamps from Mrs. Clara Center. After a jury trial, both were found guilty of that crime and sentenced to a term of five to ten years. On appeal defendants contend that the trial court improperly permitted the in-court identifications of defendants by two witnesses, and that the court erred in permitting reference at trial to property not mentioned in the indictments but taken from Mrs. Center during the robbery.

On January 10, 1972, three men wearing ladies' hose over their faces as masks and carrying guns forcibly entered Mrs. Center's home in Chicago and robbed her. The robbers forced her and her two grandsons, Eugene, 14 years old, and Quintell, 10 years old, into a bedroom. Two of the robbers then compelled the boys to accompany them throughout the home as they stole various items. In addition to the food stamps and money, the robbers took three television sets, a stereo, a record player, two tape recorders, an electric knife, food, coats, and a pair of shower curtains. After completing the looting, the robbers ripped out a telephone cord and tied the two boys together on a bed. When the robbers departed, the 85 year old Mrs. Center managed to untie the cord. One of the boys ran to a neighbor's home and the police were called.

Prior to trial, the judge suppressed a stationhouse identification of defendants as being "impermissibly suggestive," but subsequently permitted the in-court identifications. At trial, Eugene testified that, after he was shoved into the bedroom, one of the robbers, whom

he identified as Michael Williams, compelled him to go upstairs. Eugene stated that when Michael Williams raised his mask to pick up a television set, he was standing just a few inches away. Eugene was also able to look at Michael's unmasked face for about three minutes while the latter looked through a drawer. Eugene described Michael Williams as 6 feet 3 inches tall, and 180 pounds in weight. Eugene stated Michael was the one who had pulled out the telephone cord and had tied him and his brother Quintell. Eugene further testified that defendant Ronald Williams also came upstairs. While Eugene was just a few feet away, Ronald removed his mask and kept it off until he noticed Eugene staring at him. Eugene described Ronald as 6 feet 1 inch, weighing 150 to 160 pounds, and wearing a black hat with a silver band during the robbery.

Quintell testified that he also had observed these two defendants without their masks. Ronald Williams raised his mask as he was taking goods out of the home. Michael Williams ordered Quintell to show him where the money was kept under threat of pistol whipping Eugene. Quintell stated that Michael was wearing a maxi-coat with a scarf around his head and a black mask, while Ronald wore a brown mask.

Officer Alfonso Heins of the Chicago Police Department testified that on the same evening he, with other officers, attempted to stop an automobile containing three occupants near defendants' home. After an exchange of gunfire, one man escaped but the defendants were arrested. Both defendants were wearing long maxi-coats, and one had a black hat with a silver band. The police recovered three guns at the scene of the arrest. In the vehicle they discovered ladies' hosiery, three television sets, a record player, food, and other household items.

We find no merit in defendants' first contention that the trial court erred in admitting the eyewitnesses' in-court identifications of defendants into evidence. When an out-of-court identification of an accused by a witness is found to be suggestive,

an in-court identification of the accused by the witness will be permitted if it is shown clearly and convincingly to have a source independent of the illegal confrontation. (People v. Blumenshine (1969), 42 Ill.2d 508, 250 N.E.2d 152; People v. McMath (1970), 45 Ill.2d 33, 256 N.E.2d 835, cert. den. 1970, 400 U.S. 846.) In our judgment, an extended discussion of this issue is unnecessary. The two eyewitnesses not only had an excellent opportunity to view the robbers but they also proved to be perceptive and accurate observers. Both youngsters clearly demonstrated that their identifications had an origin independent of the impermissible stationhouse identification.

Defendants seek support for their argument by quoting from the record descriptions of the robbers purportedly given by Eugene at trial. The record recites that Eugene stated that Ronald Williams was wearing "all Mexico," and described Michael Williams as "got all black Mexico." There is support from other testimony for the State's reply that these phrases result from the court reporter's misinterpretation, and that Eugene actually was referring to maxi-coats. Nevertheless, we must accept the report of proceedings as certified. However, the cited phrases do not diminish the clarity of Eugene's identification of defendants. In that connection, we note that defendants were apprehended shortly after the robbery in possession of the guns, ladies' hosiery, and stolen property and while wearing maxi-coats. The trial court correctly allowed the in-court identifications of the defendants.

Defendants next maintain that reference at trial to items of personal property taken in the robbery, but not named in the indictments, was improper and deprived them of a fair trial.

Eugene testified that, in addition to money and food stamps, the robbers took television sets, record players, clothing, food, and other personal property. The taking of the household goods was a part of the same transaction as the taking of cash and the food stamps. The testimony was a part of the continuing narrative, and

it was not error to admit the testimony. See People v. Johnson (1966), 34 Ill.2d 202, 215 N.E.2d 204.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

McGLOON, P.J. and MEJDA, J., concur.



125 I.A.^{3D} 735

60396, 60397, 60398, 60399, 60400,)
60401, 60402, 60403, 60404, 60405,)
60406, 60407 60408 (Consolidated).)

PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff-Appellant,)

v.)

FRANK RAGUSCA, JAMES SMITH)
And ROY SAUER, In the Matter of a)
Search Warrant,)
Defendants-Appellees.)

) Appeal from the Circuit
) Court of Cook County,

) Honorable James E. Murphy,
) Judge Presiding.

BEFORE McGLOON, PJ., and DEMPSEY and McNAMARA, JJ.

PER CURIAM:

Frank Ragusca, James Smith and Roy Sauer were each charged in four separate indictments with possession of LSD, Marijuana, mescaline and stimulants in violation of Sections 4 and 402 of the Cannabis Control Act (Ill.Rev.Stat., 1971, ch. 56-1/2, par. 704 and 1402). The cases were all consolidated in the trial court. Each of the cases was predicated upon a search warrant which was originally issued to search Roy Saure M/W [sic] and the third floor south apartment at 2804 N. Halsted Street, Chicago, Illinois, and seize LSD, possession of which constitutes the offense of possession of a controlled substance. Each of the defendants made a motion to quash the search warrant which was granted by the trial court. The State appeals pursuant to Supreme Court Rule 604(a)(1). (Ill.Rev.Stat., 1971, ch. 110A, par. 604(a)(1).) The sole issue on appeal as to all the defendants is whether the trial court properly sustained a motion to quash the search warrant.

60396 to 60408, incl.

The record discloses that on December 8, 1973, Chicago Police Officer Philip J. Cline executed an affidavit in a complaint for a search warrant which stated:

"I, Inv. Philip Cline, a police officer of the City of Chicago, had a conversation on Dec. 8, 1973 with a reliable informant whom I have known for approximately 1 year. During the past year I have had 3 conversations with this informant regarding narcotic violations, and as a result of these conversations, I have made 3 arrests and recovered narcotic contraband on each occasion. Of the 3 cases, all 3 were indicted by the Grand Jury and are now pending in the Criminal Court. During my conversation with this informant on Dec. 8, 1973, this informant stated to me that on Dec. 8, 1973, he was in the 3rd floor south apt. at 2804 N. Halsted and there he purchased two hits of acid (LSD) from a M/W known as Roy Saure for the sum of \$10.00. The informant stated that Roy Saure cut these two hits of LSD from a sheet of paper containing a number of additional hits of LSD. The informant stated that he took one of these hits of LSD orally and that he received the same reaction that he has from using LSD in the 3 years. The informant stated that Roy Saure M/W still had the sheet of paper containing additional hits of LSD in his possession and under his direct control when he left Roy Saure in the 3rd floor south apt. at 2804 N. Halsted on 8 Dec. 73."

The search warrant issued.

At the hearing on January 31, 1974, defendants made a motion to quash the search warrant on the basis that the reliability of the informant had not been established; and that the complaint did not show probable cause for the search of the apartment specified in the warrant. The trial court, after considering the warrant and argument of counsel, granted the motion.

Defendants contend that the affidavit failed to demonstrate that there was any reason to believe that Saure (Sauer) was the offender and that there was any reason to believe

60396 to 60408, incl.

that contraband would be found at the premises. Applications for search warrants must be tested in a common sense and realistic fashion. (People v. Zacharia, 1st Dist. No. 59938, opinion October 17, 1974; People v. McGrain (1967), 38 Ill.2d 189, 230 N.E.2d 699; People v. Levin (1973), 12 Ill.App.3d 879, 299 N.E.2d 336.) The affidavit stated that on December 8, 1973 the informant was in the third floor south apartment at 2804 N. Halsted, Chicago and purchased two hits of LSD from Saure; and that Saure had additional hits of LSD in his possession and under his control when the informant left Saure in the third floor south apartment at 2804 N. Halsted on that date. These allegations were sufficiently detailed so as to enable the court to reasonably determine that Saure had a quantity of LSD in the apartment. The uncorroborated hearsay evidence of an informant will support a finding of probable cause for the issuance of a search warrant where there is a substantial basis for crediting the hearsay. People v. Mitchell (1970), 45 Ill.2d 148, 258 N.E.2d 345.

The affidavit sufficiently specified how the informant knew Sauer still had a quantity of LSD under his control. In People v. Ranson (1972), 4 Ill.App.3d 953, 282 N.E.2d 462, the court upheld a search warrant in which the police officer stated that a reliable informant had purchased a package of heroin from the defendant and "when he [the informant] left the

60396 to 60408, incl.

premises, there was still a portion of heroin in the possession and under the direct control of both persons named above." See also People v. Rivera (1970), 130 Ill.App.2d 321, 264 N.E.2d 699.

Here the affidavit stated that the informant told the police that Sauer still had an additional quantity of LSD under his control after the purchase. This statement was sufficient to enable the issuing judge to ascertain how the informant acquired his information and to determine the probability that additional LSD was still in the apartment. Similarly, the informant's statement that he knew the item purchased to be LSD because "he took one of these hits of LSD orally and that he received the same reaction that he has from using LSD in the 3 years", was sufficient to establish that a controlled substance was involved. People v. Portis (1972), 4 Ill.App.3d 333, 280 N.E.2d 712.

Defendants also argue that the affidavit failed to demonstrate that the informer was reliable. In People v. Cook (1971), 133 Ill.App.2d 335, 273 N.E.2d 261, the court found the informant reliable on the basis of an affidavit that he had furnished information which had led to one conviction, one complaint stricken with leave to reinstate, and a third case pending. In People v. Portis (1972), 4 Ill.App.2d 333, 280 N.E.2d 712, the court held that the reliability of an informant was established on the basis of an affidavit which stated that the informant had given information in the past which had led to one conviction, two cases pending and in

60396 to 60408, incl.

another case there had been a bond forfeiture. See also, People v. Lawrence (1971), 133 Ill.App.2d 542, 273 N.E.2d 637.

The affidavit of officer Cline stated that he had known the informant for approximately one year; that during the past year he had three conversations with the informant regarding narcotic violation; and that as a result of these conversations, he had made three arrests and recovered narcotic contraband on each occasion. Of the three cases, all three were indicted by the Grand Jury and were pending in the Criminal Court. These allegations were sufficient to establish the reliability of the informant.

Finally, the defendants argue that the trial court properly quashed the search warrant because the complaint was so vague that perjury could not be assigned to its allegations in the event that they were proved false. However, this issue was not argued in the trial court and, therefore, it cannot be raised for the first time on appeal. (People v. Amerman (1971), 50 Ill.2d 196, 279 N.E.2d 353.) Further, it has been held "that the matters declared which caused the search warrant to be issued may not be contested by one subjected to the search." (People v. Bak (1970), 45 Ill.2d 140, 144, 258 N.E.2d 341.)

The affidavit set forth that the police officer had received reliable information from a reliable informant. It detailed sufficient information to demonstrate the informant's reliability. The affidavit then set forth the informant's statements revealing

60396 to 60408, incl.

the underlying circumstances justifying a search. From the information contained, the issuing judge was clearly able to make an independent evaluation on the reliability of the informant and reasonably to conclude that there was contraband in the apartment. (Aguilar v. Texas (1964), 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723; Spinelli v. U.S. (1969), 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637.) The complaint for search warrant demonstrated probable cause and the search warrant was properly issued.

The order of the trial court quashing the search warrant is reversed and the cause remanded for further proceedings.

ORDER REVERSED AND CAUSE REMANDED.

Jan 23, 1975
111 Apin
3rd Div



3D
25 I.A. 747

NO. 58947

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 v.)
)
ALFONZO FORD,)
)
 Defendant-Appellant.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

HONORABLE
FRANCIS T. DELANEY,
PRESIDING.

Before Barrett, P.J., Lorenz, J. and Sullivan, J.

Per Curiam (First District, Fifth Division)

Defendant entered a plea of guilty to armed robbery in violation of section 18-2 of the Criminal Code. (Ill. Rev. Stat. 1969, ch. 38, par. 18-2.) He was sentenced to probation for five years with the first three months to be served in the county jail which time was considered served. This sentence was subsequently modified and defendant was ordered to serve the first year of his probation in the county jail because he had been convicted of intimidation. When defendant was later convicted of battery and theft, the court revoked his probation on the armed robbery conviction and sentenced him to a term of two years to two years and one day. Defendant appeals from the revocation of his probation contending that the order should be reversed because the convictions for battery and theft had been reversed.

On February 14, 1973, after defendant had pled guilty to armed robbery and after his term of probation on that charge had been modified because of the conviction for intimidation, a rule to show cause why probation should not be terminated was issued. The rule was based upon the report of defendant's probation officer which alleged that defendant had failed to report to his probation officer and that defendant had been convicted of battery and theft.

A hearing on this rule to show cause was held on February 28, 1973. While the parties were arguing the relative merits of the allegation that defendant had failed to report, the trial court remarked: "Forget it. I am not worried about that ***, " and proceeded to seek information regarding the convictions for theft and battery. Although

the trial court expressed reservations about basing the revocation probation upon convictions which could be reversed on appeal, the transcript of the proceedings relative to those convictions was examined and the court did revoke defendant's probation. We note that defendant's convictions for battery and theft have been reversed and the cause has been remanded for new trial. People v. Ford, 21 Ill. App. 3d 242, 315 N.E.2d 87.

OPINION

Defendant contends that the order revoking his probation should be reversed because his convictions for battery and theft, which were the basis of the order revoking his probation, have been reversed. The State argues that the evidence adduced regarding the offenses of theft and battery, apart from that adduced as to the simple fact of the conviction, constituted sufficient grounds upon which the court could have found a violation of probation by a preponderance of the evidence.

Probation may be revoked only upon the introduction of competent evidence. (See e.g., People v. Collins, 14 Ill. App. 3d 446, 448, 302 N.E.2d 709, 711.) Where the basis of a revocation is the conviction for a criminal offense committed during the period of probation, the reversal on appeal of that conviction requires that the fact of the conviction, of itself, not stand as the basis for such revocation but the offense charged be otherwise independently proven by a preponderance of the evidence at the revocation hearing. See e.g., People v. Kaplan, 7 Ill. App. 3d 155, 287 N.E.2d 246; People v. Smith, 10 Ill. App. 3d 822, 295 N.E.2d 20 (abst.); People v. Norys, 18 Ill. App. 3d 286, 309 N.E.2d 659 (Abst.).

In the instant case, the sole ground upon which the trial court revoked defendant's probation was defendant's conviction of the offenses of theft and battery committed during the period of probation, which was subsequently reversed by this court on appeal. The other ground alleged in the rule -- the failure of defendant to report to his probation officer -- was expressly disregarded by the trial court as a ground for the revocation; significantly, the evidence adduced as to that alleged violation was, at best, equivocal.

The evidence adduced at the probation revocation hearing, on the question of the offenses of theft and battery and apart from that adduced as to the simple fact of defendant's conviction, consisted solely of a recitation by counsel from the transcript of the complaining witness' testimony given by her at the trial which resulted in the conviction. That evidence demonstrated the complaining witness' inadequate opportunity to observe her assailant which also served as the basis for this court's reversal and remandment of that cause. The testimony of the complaining witness at that trial, when considered apart from the other, improper evidence adduced therein, was insufficient to support the conviction for the offenses of theft and battery. That identical evidence, which the State now contends independently supports the order of revocation of defendant's probation, was also insufficient, standing alone, to support the revocation by a preponderance of the evidence. That evidence has been characterized as "less than ideal to produce a positive identification" and no corroborating evidence was presented. In these circumstances the order of the circuit court of Cook County revoking defendant's probation must be reversed.

Reversed.

[ABSTRACT ONLY]



25 I.A. ^{3D} 761

59348

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
v.)	
)	
BILLY FRAZIER,	)	HONORABLE
	)	LOUIS B. GARIPPO,
Defendant-Appellant.	)	JUDGE PRESIDING.

Before Barrett, P.J., Drucker, J., and Lorenz, J.
PER CURIAM, First District, Fifth Division

Defendant was charged by indictment with armed robbery, attempt murder, and two charges of aggravated assault. (Ill. Rev. Stat. 1971, ch. 38, pars. 18-2, 8-4, 12-2.) After a jury trial, defendant was found not guilty of attempt murder, guilty of armed robbery, and guilty on both counts of aggravated assault. He was sentenced to a term of five to fifteen years for armed robbery and one to three years on each charge of aggravated assault, all sentences to run concurrently.

Defendant appeals, arguing (1) that the trial court erred in denying his motion for a discharge under the Four Term Act; (2) that the in-court identification of him was tainted by a suggestive lineup; (3) that verdicts of guilty of aggravated assault should be reversed because they are inconsistent with the verdict of not guilty of attempt murder; and (4) that his sentence for aggravated assault is excessive under the Unified Code of Corrections.

At trial, John Russell testified that in the early morning hours of January 9, 1972, he left his friend's apartment with Virginia Cheatham and Juanita Williams. As the witness left the building, defendant asked him if he had a light. He responded that he did not have a light and started to walk to his car, which was across the street. Defendant then grabbed his right arm and said, "Don't move." The witness pulled his

arm loose, and defendant hit him in the neck with something metallic. He turned around, facing defendant, and observed that defendant had a gun pointed at him. Defendant ordered him to hand over his car keys, and he complied. Defendant then grabbed Virginia Cheatham by the hand and ran with her toward King Drive. The entire incident took between three and four minutes.

The witness returned to his friend's apartment and immediately called the police. Later that night he viewed a lineup of five men and identified defendant as the man who robbed him. While at the police station, Officer Visone returned the car keys which were taken from the witness during the robbery.

Margaret Ricks testified that on January 9, 1972, at approximately 12:30 a.m., while returning from a girlfriend's house, she got off a bus at 50th and King Drive. She observed defendant pulling a girl by the arm across the intersection. A police car arrived, and defendant let go of the woman and ran into an alley, with the police in pursuit. She heard shooting in the alley and then observed defendant being placed under arrest.

Paul H. Williams, a Chicago police officer, testified that on January 9, 1972, at approximately 12:30 a.m., he and his partner, Daniel Visone, were on patrol in the area of 50th and King Drive. At that location he observed defendant pulling a woman by the hand across the street. The woman shouted, "Help, I'm being robbed." He stopped his squad car, and his partner chased defendant on foot. He drove into an alley between Calumet and King Drive. After hearing shots, he went around the corner, where he confronted defendant and placed him under arrest. A search of defendant revealed two sets of keys, one of which was identified as belonging to John Russell. A search of the area where defendant had been revealed a .22 caliber Imperial revolver with five live rounds of ammunition and one spent shell.

Daniel Visone, a Chicago police officer, corroborated the testimony of Officer Williams and in addition testified that as he chased defendant, defendant ran into an alley and through a vacant lot. As the witness entered the vacant lot, defendant turned and fired one shot at him. The witness dropped to the ground and returned defendant's fire. Defendant continued to run and was placed under arrest by Officer Williams.

David Olsen, a Chicago police investigator, testified that he was the investigating officer in the robbery of Russell. A lineup of five men, including defendant, was held on January 9, 1972, at Area 1 headquarters. The complainant, John Russell, viewed the lineup.

OPINION

Defendant's first contention is that the trial court erred in denying his motion for discharge as to the charge of armed robbery under the Four Term Act. (Ill. Rev. Stat. 1971, ch. 38, par. 103-5.) The record reflects that defendant was arrested on that charge on January 9, 1972, and was released on bond on March 1, 1972. Then, on March 17, 1972, defendant was arrested on unrelated charges. He remained in custody from that day on.

At a preliminary hearing, on April 3, 1972, the instant attempt murder and aggravated assault charges were continued by agreement. The armed robbery charge was stricken with leave to reinstate and defendant demanded trial on that charge. On July 25, 1972, the grand jury indicted defendant on all the instant charges. Two days later, defendant was arraigned and requested a continuance.

On the day of trial, defense counsel informed the trial court that there was a four term problem on the armed robbery

charge because defendant had demanded trial at the preliminary hearing held on April 3, 1972, when the charge was stricken. A discussion ensued on the question of whether defendant had requested a continuance that tolled the running of the term. An examination of the record revealed that defendant had requested a continuance on July 27, 1972, less than 120 days after he had demanded trial. Defense counsel's motion for discharge was denied.

Defendant now argues that the term on the armed robbery charge began to run not on April 3 but on March 17, when he was taken into custody on the unrelated charges. He claims that the term continued to run when he demanded trial on April 3, even though the charge was stricken.

In People v. McAdrian, 52 Ill.2d 250, 287 N.E.2d 688, the defendant was discharged under the Four Term Act, and the State attempted to adopt on appeal a theory other than the one advanced in the trial court to justify requiring the defendant to stand trial. In refusing to allow the State to adopt a new theory, the Supreme Court noted that:

"The failure to urge a particular theory before the trial court will often cause the opposing party to refrain from presenting available pertinent rebuttal evidence on such theory, which evidence could have a positive bearing on the disposition of the case in both the trial and reviewing courts." (52 Ill.2d at 254, 287 N.E.2d at 690.)

The court refused to consider the State's new theory even under Supreme Court Rule 615(a), which grants discretion to reviewing courts to consider alleged errors that affect substantial rights and are not brought to the attention of the trial court. Ill. Rev. Stat. 1973, ch. 110A, par. 615(a).

In the case at bar, defense counsel's motion for discharge under the Four Term Act was based solely on the ground that the term began to run on the day when defendant demanded trial. On appeal defendant has changed his theory and presented an argument upon which the trial court had no opportunity to rule. As was the case in McAdrian, had defendant raised this theory in the trial court, and had the trial court adopted it, the State would have had the opportunity to present rebuttal evidence that is now absent from the record. For example, the State might have shown that the unrelated charges were brought to trial before the term expired and that as a result the term for the armed robbery charge was extended. (Ill. Rev. Stat. 1971, ch. 38, par. 103-5(e).) Thus we hold that defendant has waived his right to have his theory considered on review by his failure to raise it in the trial court.

Defendant's second contention is that his in-court identification was tainted by a suggestive lineup. The basis of his claim is that he was the only man in the lineup who had a rag tied around his head, who had a moustache and a goatee, and who was wearing a brown fringe jacket. The burden is on the defendant to establish that the circumstances attending the lineup were so suggestive as to give rise to a very substantial likelihood of irreparable mis-identification. People v. Pagan, 52 Ill.2d 525, 288 N.E.2d 102.

This burden has not been met. In the case at bar, a lineup of five men was conducted within hours of the crime. Photographs were taken of the lineup and were introduced into evidence at defendant's trial. They demonstrate that all of the men in the lineup were approximately the same height, age and complexion. The men were wearing dark jackets of various lengths and styles. Defendant's moustache and goatee are barely

discernible and would not likely be noticed unless particular attention was called to them. Under these circumstances we conclude that the lineup was not unduly suggestive. See People v. Jones, 7 Ill.App.3d 820, 288 N.E.2d 918.

Furthermore, complainant testified that during the crime, which took three to four minutes, he had an opportunity to observe defendant from close proximity. Margaret Ricks also had a good opportunity to view defendant. Both witnesses identified defendant shortly after the offense occurred. Neither one expressed uncertainty or identified any person other than defendant. There was no discrepancy between the descriptions they gave and defendant's actual appearance. Thus even were the lineup to be considered unduly suggestive, there is clear and convincing evidence that the in-court identification is of an independent origin and arises from an earlier, uninfluenced observation of defendant. The in-court identification was proper. People v. Blumenshine, 42 Ill.2d 508, 250 N.E.2d 152; People v. Patrick, 53 Ill.2d 201, 290 N.E.2d 227.

Defendant's third contention is that the verdicts of guilty of aggravated assault of Officer Visone should be reversed because they are inconsistent with the verdict of not guilty of attempt murder of the officer. The rule in Illinois is well established that where verdicts of acquittal and conviction are returned on separate counts of the same indictment, reversal is not required so long as the verdicts are not legally inconsistent. There is no legal inconsistency in verdicts of acquittal and conviction where the crimes are composed of different elements but arise from the same set of facts. (People v. Hairston, 46 Ill.2d 348, 263 N.E.2d 840.) The jury could have found from the evidence presented in the instant case that the crime of aggravated assault, for which

any of several mental states will suffice, was proven beyond a reasonable doubt. (Ill. Rev. Stat. 1971, ch. 38, pars. 12-2, 4-3.) The jury could well have found in addition that defendant lacked the intent to commit murder, and thus was not guilty of attempt murder. (Ill. Rev. Stat. 1971, ch. 38, par. 8-4.) The verdicts are therefore neither logically nor legally inconsistent.

The State has called to our attention the fact that both of defendant's convictions for aggravated assault were based upon the same conduct, i.e., defendant's firing a gun at Officer Visone. Count 2 of the indictment charged defendant with a violation of section 12-2(a)(6) of the Criminal Code (assault on a police officer engaged in the execution of his official duties), and Count 3 charged defendant with a violation of section 12-2(a)(1) (assault with a deadly weapon). Under these circumstances, defendant may be convicted and sentenced on only one charge. (People v. Lilly, 56 Ill.2d 493, 309 N.E.2d 1.) One of defendant's convictions for aggravated assault must, therefore, be reversed.

Defendant's final contention is that his sentence for aggravated assault must be reduced under the Unified Code of Corrections, which is applicable because his case has not yet reached the stage of final adjudication. (People v. Chupich, 53 Ill.2d 572, 295 N.E.2d 1; People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269.) Aggravated assault is a Class A misdemeanor (Ill. Rev. Stat. 1973, ch. 38, par. 12-2), the penalty for which, under the Code, is incarceration for a determinate term of less than one year. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-3(a)(1).) Defendant's sentence on the charge of aggravated assault is reduced, in accordance with the request of the State, to a term of 11 months.

For the reasons stated, one of defendant's convictions (Count 2 of the indictment) for aggravated assault is reversed, the sentence on defendant's second conviction (Count 3 of the indictment) for aggravated assault is reduced to a term of 11 months, and the judgments of guilty of armed robbery and one charge of aggravated assault are affirmed as modified.

REVERSED IN PART.
AFFIRMED IN PART AS MODIFIED.

PUBLISH ABSTRACT ONLY.



25 I.A. ^{3D} 763

59681

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Respondent-Appellee,)	
)	
v.)	
)	
CHARLES SANFORD,	)	HONORABLE
	)	JOSEPH A. POWER,
Petitioner-Appellant.)	)	PRESIDING.

Before Drucker, J., Lorenz, J., and Sullivan, J.

Per Curiam. First District, Fifth Division.

On October 11, 1966, petitioner was found guilty after a jury trial of the crimes of murder and arson. He was sentenced to a term of 50 to 75 years on each charge, the sentences to run concurrently. Petitioner appealed to this court which affirmed the judgment of conviction on October 3, 1968 (People v. Sanford, 100 Ill. App.2d 101, 241 N.E.2d 485). On January 23, 1968, petitioner filed a pro se post-conviction petition, and the public defender was appointed to represent him. Subsequently the public defender was granted leave to withdraw, and private counsel was appointed to represent petitioner. After reviewing the record, counsel filed an Anders type brief. On December 4, 1969, petitioner's pro se post-conviction petition was dismissed without an evidentiary hearing. Petitioner did not appeal.

On September 12, 1972, petitioner filed a second post-conviction petition in which he alleged for the first time that he was improperly convicted and sentenced for two crimes, both of which arose out of the same course of conduct. The State filed a motion to dismiss the second post-conviction petition on the ground that all issues raised were res judicata. On September 14, 1972, the State's motion to dismiss was sustained.

Petitioner appeals arguing that he was entitled to post-conviction relief on the allegation in his second post-conviction petition that he was improperly convicted and sentenced for two

offenses which arose out of the same course of conduct. The law is clear that where two offenses arise out of the same course of conduct there can be but one conviction of a crime. (People v. Lilly, 56 Ill.2d 493, 309 N.E.2d 1.) Further, this allegation is cognizable under the Post-Conviction Hearing Act. People v. Russo, 52 Ill.2d 425, 288 N.E.2d 412.

A review of the facts as stated in this court's affirmance of petitioner's direct appeal (People v. Sanford, 100 Ill. App.2d 101, 241 N.E.2d 485) demonstrates that the defendant's actions which constituted the offense of arson and murder were both part of a single course of conduct. Under these circumstances petitioner could be convicted only of the greater offense. The State urges that we reject defendant's contention on the basis of res judicata in that petitioner did not raise this issue in his direct appeal. The Supreme Court has held that this issue even though not raised on a direct appeal is recognizable under the Post-Conviction Hearing Act. Russo.

The State also argues that since petitioner did not raise this issue in his first post-conviction petition, the issue is res judicata or waived. However, the doctrine of res judicata and waiver may be relaxed where fundamental fairness requires it. (People v. Hamby, 32 Ill.2d 291, 205 N.E.2d 456; People v. Mamolella, 42 Ill.2d 69, 245 N.E.2d 485.) Here, after a complete review of all the proceedings, we conclude that fundamental fairness requires us to consider petitioner's contention. Since petitioner's actions which constituted the offenses of arson and murder were part of a single course of conduct, petitioner could properly be convicted and sentenced only for the greater offense.

For the foregoing reasons the judgment dismissing petitioner's post-conviction petition is reversed, and the cause is remanded with directions that the judgment on the arson charge be vacated.

REVERSED AND REMANDED WITH DIRECTIONS.

Abstract only.



3D
25 I.A. 764

No. 60245

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY
)	
v.)	
)	
ALFRED CHANEY and RUFUS MALLARD,	)	HONORABLE
	)	ALBERT S. PORTER
Defendants-Appellants.)	)	PRESIDING

Before Barrett, P.J., Drucker and Sullivan, JJ.

PER CURIAM: (First District, Fifth Division)

Defendants were found guilty after a bench trial of the crime of armed robbery in violation of section 18-2 of the Criminal Code (Ill. Rev. Stat. 1973, ch. 38, par. 18-2). Each was sentenced to a term of four to six years.

They wished to appeal, and the Public Defender was appointed to represent them. After examining the record, the Public Defender has moved in this court for leave to withdraw as appellate counsel. The motion, supported by a brief pursuant to Anders v. California, 386 U.S. 738, states that the only possible arguments which could be raised on appeal are (1) that defendants' guilt was not established beyond a reasonable doubt because the identification testimony was insufficient and because the defendants were not accountable for the actions of their companions; and (2) that defendants' sentences are excessive. The brief concludes that an appeal on these issues would be wholly frivolous and without merit. Defendants were mailed copies of the motion and brief on September 15, 1974 and were informed that they had until November 14, 1974 to file any additional points they might choose in support of their appeal. They have not responded.

At trial, Andrew Silva testified that on January 26, 1973, at approximately 1:30 A.M., David Carpenter and Frankie Jones came into the gas station where he was employed and asked him about a can of oil. A customer then drove into the

station, and the two men left. Before they came into the station, Silva had observed defendants Chaney and Mallard standing on the sidewalk talking with Carpenter and Jones. A short time after they left, Silva heard a car pull up in the alley behind the station, and Carpenter and Jones then re-entered the station. Carpenter produced a gun and announced a holdup. At that time, Silva observed Chaney standing outside the office on the sidewalk and Mallard standing at the north end of the gas station. Carpenter and Jones took two coin changers, together with coins and bills totalling approximately \$99, and Carpenter then struck Silva with the gun.

After the robbery, Silva observed all four men leave together, and he immediately phoned the police and gave a general description of the men. He was taken to the hospital, where he received several stitches in his head. Silva also testified that in the early morning hours of January 26, 1973, he went to the police station, where he viewed a line up of eight men and identified defendants Chaney and Mallard as two of the men who had robbed him.

Steven Sorich, a Chicago police officer, testified that on January 26, 1973, at approximately 2:00 A.M., he and his partner, Robert Krause, received a radio call of a robbery, and on their way to the location of the robbery they were passed by a vehicle containing four male negroes. One of the men in the vehicle appeared to fit the description of a participant in the robbery, and they stopped the car. Carpenter and Chaney were seated in the rear of the vehicle and Jones and Mallard in the front. Sorich observed a metal coin changer on the rear seat and what appeared to be the butt of a revolver sticking out from behind the rear cushion, and all four occupants of the car were placed under arrest. A search of the vehicle then revealed two coin changers, a roll of change and a .38 caliber revolver.

It was stipulated that if Chicago Police Officer Robert Krause was called, his testimony would be substantially the same

as that of Sorich.

It was also stipulated that if Chicago Police Detective Henry J. Leja were called, he would testify that on January 26, 1973, he was at the 9th District Chicago Police Station, where a line up of eight men was conducted; that included in the line up were David Carpenter, Frankie Lee Jones, Alfred Chaney and Rufus Mallard; that Andrew Silva viewed the line up and identified Chaney and Mallard as two of the men who had robbed him previously.

The first possible argument which could be raised on appeal is that defendants' guilt was not established beyond a reasonable doubt, because the identification testimony was insufficient. The credibility of witnesses and the weight to be given to their testimony are questions for the trier of fact, and his decision will not be reversed on appeal unless it is based upon evidence so unsatisfactory as to leave a reasonable doubt as to defendants' guilt. (People v. Clark, 52 Ill.2d 374, 288 N.E.2d 363.) The identification by one witness to a crime, where positive and credible, is sufficient to sustain a conviction. (People v. Bennett, 9 Ill.App.3d 1021, 293 N.E.2d 687.) In the case at bar, the testimony of Silva was positive and credible. He described the lighting conditions at the time of the robbery, during which he viewed the defendants. His testimony established that he had an adequate opportunity to view the defendants so as to fix their identity. He identified both defendants on the day of the robbery after viewing a line up of eight men. This evidence was sufficient to justify the trial judge's finding of guilt beyond a reasonable doubt.

The next possible argument which could be raised on appeal is that the evidence was insufficient to establish beyond a reasonable doubt that defendants were accountable for the conduct of their companions. Under Section 5-2(c) of the Criminal Code (Ill. Rev. Stat. 1973, ch. 38, par. 5-2(c)), a person is legally accountable for the conduct of another when:

"Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense."

Where defendants have a common design to do an unlawful act, the act of any one of them done in furtherance of the common design is the act of all. (People v. Kessler, 57 Ill.2d 493, 315 N.E.2d 29.) Proof of a common design need not be supported by words or agreement but can be drawn from the circumstances surrounding the commission of the act. People v. Richardson, 32 Ill.2d 472, 207 N.E.2d 478.

Here, the uncontradicted evidence established that before the robbery Chaney and Mallard were seen by Silva standing with and talking to Carpenter and Jones outside the gas station, before the initial entrance of Carpenter and Jones. When those two men entered the station the second time, Carpenter produced a gun and announced a robbery. At that time, Chaney and Mallard were standing outside the station, apparently as lookouts. Immediately after the robbery the four men left together, and a short time later all four were together in a car at the time of their arrest. A search of that vehicle revealed two coin changers, identified as those taken in the robbery, and a .38 caliber revolver which was identified as the gun used in the robbery. From the totality of these circumstances, the trial judge could reasonably have inferred that defendants were more than just innocent bystanders and that they were aiding and abetting in its commission.

The final argument which could be raised on appeal is that defendants' sentences are excessive and should be reduced. While this court has the power to reduce sentences (Ill. Rev. Stat. 1973, ch. 110A, par. 615(b)), that power should be exercised with care and only where it is manifest in the record that the sentence is excessive. (People v. Fox, 48 Ill.2d 239, 269 N.E.2d 720; People v. Conway, 3 Ill.App.3d 69, 278 N.E.2d 852.) In the case at bar, it was established that defendants

were part of an armed robbery during which the victim was struck in the head with a gun. The hearing in aggravation and mitigation revealed that Chaney had a prior conviction for burglary as did Mallard, who also had two convictions of unlawful use of weapons and two convictions of criminal trespass to property. The sentences imposed were within the statutory limits for the crime of armed robbery and the minimum sentences were the lowest possible under the statute. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(b)(2).) The sentences imposed are not excessive.

We have examined the record and concur in the opinion of the Public Defender that the arguments that could be raised do not have substantial merit. Our review of the record discloses that any other possible grounds for appeal are also without merit.

The Public Defender of Cook County is granted leave to withdraw as counsel on appeal, and the judgments are affirmed.

Affirmed.

Publish abstract only.

25 I.A. 793

(24540-4M-9-70) 160-o

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE SAMUEL O. SMITH, _____ Presiding Judge

HONORABLE JAMES C. CRAVEN, _____ Judge

HONORABLE LELAND SIMKINS, _____ Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 6th day
of November A. D. 1974, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

FILED

NOV 6 1974

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

Robert L. Conn, CLERK
APPELLATE COURT 4TH DISTRICT

General No. 12221

Agenda No. 74-40

THE PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee)
)
v.)
DONALD WORLOW,)
)
Defendant-Appellant)

Appeal from
Circuit Court
Sangamon County
555-72

OPINION AS MODIFIED ON DENIAL OF REHEARING

Mr. JUSTICE CRAVEN delivered the opinion of the court:

Defendant was indicted, tried and found guilty in a jury trial of armed robbery. A judgment was entered on the verdict and defendant was sentenced to an indeterminate term of 15 to 45 years. Defendant appeals from the judgment of conviction and the sentence imposed.

On appeal, defendant questions the propriety of the trial court's ruling that admitted certain lineup and in-court identification testimony. Furthermore, defendant urges that he was not proved guilty beyond a reasonable doubt, and the sentence imposed was excessive.

Around 7 p.m. on December 18, 1971, an individual entered the outer office of the Grandview IGA food store. Ivan

A. Padgett, the store manager, was working at his desk in the office. He observed the subject, under the store's fluorescent lights, for approximately five minutes at a distance of three feet. The man pulled a small calibre handgun and announced, "This is a holdup." He told Padgett to open the safe and put the money in the bag. Padgett put approximately \$6500 into the bag and gave it to the assailant.

Sometime during the robbery, Delores Harmony on a break returned to the office. The defendant held her hostage with Padgett. After the robbery had been completed, defendant forced Padgett and Mrs. Harmony to accompany him out the front of the store. As the three left the store, they walked across a well-lighted patio and Gary Alexander, a stock boy, passed them as he entered the store to begin work. Alexander observed the defendant's face for a few seconds.

As soon as the three had walked across the parking lot, defendant instructed Padgett and Harmony to turn around and walk back to the store. As they walked towards the store, the defendant ran in the opposite direction toward a parked car, got into the car, and sped away. Immediately thereafter, the authorities were notified of the armed robbery.

Officer Joe D. Patton went to the food store and received a tentative description of the armed robber. Padgett and Harmony described their assailant as being 5'8" to 5'9" tall, weighing 160-165 lbs., 40-50 years of age, having long grey sideburns and

no mustache, and that he wore a three-quarter length coat and a dark furry hat. Padgett characterized the hat as a "Russian" hat. Alexander described the assailant as being 5'8" to 5'10" tall, with sideburns and no mustache. His recollection of any of the details was hazy.

Officer Patton returned to the store on January 31, 1972, with five "mug shots" of various individuals and a Polaroid picture of the defendant Donald Worlow. Padgett, Harmony and Alexander all viewed these photographs. The record is uncertain as to whether Padgett or Alexander made an identification when shown these photographs; however, Mrs. Harmony did make a tentative identification of the defendant.

Padgett and Harmony were called to the Springfield Police Department on June 9, 1972, to view a lineup. The lineup was conducted by officer William Demarco. There were five individuals present in the lineup. Padgett and Harmony viewed the lineup separately and Alexander did not view the lineup at all. Padgett and Harmony were not permitted to talk and they were not instructed to pick anyone out during the lineup. Both Padgett and Harmony identified defendant as the robber.

Defendant's trial commenced on November 27, 1972. The State called a total of five witnesses. The first witness was officer Joe Patton. He related in his testimony that he had shown Padgett, Harmony, and Alexander pictures of various mug shots of different individuals and a Polaroid snapshot of the defendant.

The State next called Padgett. He testified concerning the events surrounding the armed robbery itself. In the course of his testimony, he positively identified the defendant as being the individual that robbed the IGA Foodliner. He also testified about the photographs that officer Patton had shown him. The defendant objected to the witness testifying as to any identification based upon the photographs that he had viewed. Since there was a positive in-court identification, the court overruled defendant's objection. Padgett then began to testify about the lineup identification he had made of defendant. However, he was again interrupted by defendant's objection and a motion to suppress the testimony dealing with the lineup identification. The court then conducted a hearing outside the presence of the jury on the motion to suppress. During this hearing, Padgett identified defendant as the man who robbed him and the man he picked out of the lineup. The trial court denied defendant's motion. The jury was brought back into the courtroom. At that time, Padgett again identified the defendant as the man he had picked out at the lineup.

The State called Mrs. Harmony to testify. A hearing was held to suppress her testimony regarding photographs and lineup identification of defendant prior to her in-court testimony and outside the presence of the jury. She stated she believed defendant resembled the man who robbed the store, however, she was not positive. She also admitted that when she picked defendant out of the lineup, she only did so because he strongly

resembled the robber. She stated she would probably identify the defendant even if she hadn't seen him in the lineup. During the course of this hearing on the motion to suppress, it was brought out, as it was during Mr. Padgett's testimony, that defendant was identified at the lineup as the armed robber despite the fact that at that time he had a mustache and during the robbery he had none. After the hearing the court denied the motion to suppress. The court stated:

" * * * Although the witness is not necessarily positive as to the identification, the Court feels that it goes to the credibility of the witness's identification and not to the admissibility, * * * ."

After the jury was brought back into the courtroom, Mrs. Harmony identified the defendant.

On redirect examination, Mrs. Harmony was asked which photograph she had identified for officer Patton when she made her tentative identification of defendant. Defense counsel objected on the grounds that the photographic identification was unduly suggestive and prejudicial, whereupon a colloquy was had at the bench and out of the hearing of the jury concerning this matter. Consequently, the court sustained defendant's objection. The court ruled as follows:

"I have seen the photographs in question and I feel they are unduly suggestive, after examination-- they show the defendant full length and I feel that tends to pick him out [sic] over and above the other five."

After the court's ruling, Mrs. Harmony was excused from the stand and officer William Demarco was called by the State to testify.

Demarco testified that he conducted the lineup which was held on June 9, 1972. After the lineup in question, he talked individually with Padgett and Harmony. Padgett identified the defendant as the armed robber and Harmony tentatively identified defendant. On cross-examination, Demarco stated that the individual Padgett and Harmony identified had a mustache the day of the lineup.

Gary Alexander was then called by the State. In his testimony, he related to the jury that he observed the armed robber, Mr. Padgett, and Mrs. Harmony, leave the Grandview IGA food store on the night in question. He admitted that he saw the man only a few seconds. He could not make a positive identification of the defendant, however, he did state that defendant resembled the man he saw on the night in question. On cross-examination, he stated that he did not view the lineup. After Alexander's testimony, the State moved to have People's exhibit No. 7, a photograph of the lineup, admitted into evidence. Defense counsel objected on the grounds that it was unduly suggestive and that Padgett in the course of his testimony could not state with certainty that this was a picture of the lineup that he had viewed. The trial court overruled defendant's objection and admitted the photograph into evidence. The court reasoned that since it had ruled as a matter of law that the lineup itself

was not suggestive. The trial court noted that he was going to reserve his ruling as to whether or not the photograph would ultimately go to the jury. Thereafter, the State rested its case.

The defense called only one witness, Mary Esther Michels. During her testimony, she attempted to establish an alibi for defendant. She testified that on the night in question, December 18, 1971, she and defendant were present at 931 South Fourth Street, visiting one Mary Wilhite. Defendant was present at the aforesaid address from about 2 p.m. until 10 p.m. During this time, they watched TV, drank beer, soda, and ate a dinner. She further testified that defendant had a mustache at that time. She also said that no one left the apartment nor could anyone have possibly left without her knowledge.

On cross-examination, she testified that her memory for the events which took place on December 18 were vivid because Miss Wilhite had asked her to come over and decorate a Christmas tree. However, one was never purchased. At the conclusion of her testimony, the defense rested and final arguments were given.

On December 20, 1972, a presentence hearing was held. In the hearing, defense counsel presented little evidence in the way of mitigation. However, it was established that defendant was currently a trusty in the jail and was an exemplary inmate while waiting trial. Defendant testified that he had a wife and child, that his wife had helped "keep him straight."

The State introduced evidence of defendant's rather intermittent work record and certified copies of various prior convictions. Included in the most recent convictions was a 1962 federal conviction for obstruction of correspondence and forgery of U.S. Treasury checks for which defendant was sentenced to five years in the federal penitentiary, and a 1972 theft conviction for which he presently was on probation.

After all the evidence was presented, the court sentenced defendant to an indeterminate term of 15 to 45 years in the penitentiary.

Defendant urges that the trial court erred in refusing to suppress the lineup and in-court eyewitness identification testimony on the grounds that said testimony was based upon photographic identification procedures which the trial court found were unduly suggestive. We cannot agree.

The general rule is that when an in-court identification is predicated upon a prior identification procedure which was so unnecessarily suggestive as to be conducive to irreparable mistaken identification, the defendant is denied due process of law and is entitled to a new trial. (Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199; People v. Pierce, 53 Ill.2d 130, 290 N.E.2d 256.) In People v. Blumenshine, 42 Ill.2d 508, 250 N.E.2d 152, it was held that a defendant claiming that a confrontation was unnecessarily suggestive must carry the burden of proof.

Defendant carried this burden of proof with regard to People's exhibits 1 through 6. The court found that these exhibits which consisted of photographs from which defendant was identified by Mrs. Harmony were unduly suggestive. However, defendant failed to establish that the lineup identification and the subsequent eyewitness in-court identification was tainted. The trial court found that the testimony of Padgett and Harmony concerning the lineup identification of defendant was admissible for the basic reason that the lineup itself was properly conducted. The record establishes that the trial court sought to determine whether the identification of the defendant by the various witnesses at the lineup and Padgett's subsequent in-court identification were based upon independent sources other than the tainted photographic identification procedures. The court found that they were and that ruling was not erroneous.

Padgett's identification testimony was firm. The record reveals that he did not make a tentative identification of defendant from the tainted photographic procedures. Furthermore, his testimony was corroborated by the weaker identification testimony of Harmony and Alexander. The fact that neither Harmony nor Alexander were certain in their in-court identification of defendant only goes to the weight of their testimony, not admissibility.

Next, defendant urges that the State failed to prove his guilt beyond a reasonable doubt. Defendant raises numerous contentions as to why his guilt was not proven beyond a reasonable doubt; however, all of these contentions essentially boil down

to a question of credibility. It is the duty of the trier of fact to evaluate the credibility of witnesses in making its determination of guilt or innocence of the defendant. Its finding of guilt will not be disturbed unless the evidence is so improbable as to leave a reasonable doubt of defendant's guilt. People v. Curry, 56 Ill.2d 162, 306 N.E.2d 292.

Defendant contends that the sentence of 15 to 45 years is excessive.

Armed robbery is a Class 1 felony under the Unified Code of Corrections. (Ill.Rev.Stat.1973, ch. 38, ¶ 18-2(b).) Defendant may be sentenced to any term in excess of 4 years as a maximum. (Ill.Rev.Stat.1973, ch. 38, ¶ 1005-8-1(b)(2).) The minimum term for a Class 1 felony is 4 years unless the trial court determines that under the nature and circumstances of the offense and the history and character of the defendant, a higher minimum shall be set. (Ill.Rev.Stat.1973, ch. 38, ¶ 1005-8-1(c)(2).)

Under Supreme Court Rule 615(b)(4) (Ill.Rev.Stat.1973, ch. 110A, ¶ 615(b)(4)), this court has the power to reduce defendant's sentence if it is manifestly excessive. This power should be used with caution and due circumspection, since the sentence disposition is peculiarly within the discretion of the trial court. (People v. Caldwell, 39 Ill.2d 346, 236 N.E.2d 706.) The trial court is generally in a superior position vis a vis a reviewing court in determining a just and equitable sentence, therefore, the reviewing courts are reluctant to interfere

when the sentence is within the statutory range. (People v. Kurtz, 37 Ill.2d 103, 224 N.E.2d 817.) The language of this court in People v. Dandridge, 9 Ill.App.3d 174, 292 N.E.2d 51, is, however, equally applicable to this case. We there stated:

"The Constitution of 1970, Art. 1, par. 11, directs that the courts impose penalties:

'All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.'

"The administration of such directive remains a difficult enigma. The State provides an elaborate apparatus which seeks to measure rehabilitation achieved during the course of incarceration. The question of whether the length of sentence imposed may interfere with or nullify available procedures for rehabilitation arouses strongly conflicting views.

"Under the present rules providing for diminution of sentence for good conduct, a minimum sentence of ten years would mean that under the best of conduct defendant would be eligible for parole consideration in six years and nine months. Within the constitutional mandate, if defendant can achieve satisfactory conduct and meet the available tests of rehabilitation, such sentence is a tolerable response to the aggravating circumstances found here.

"This conclusion is not reached as a substitute for the judgment of the trial court, but rather as a search for appropriate action under the constitutional direction." (9 Ill.App.3d at 176, 292 N.E.2d at 52.)

For the reasons and upon the authority stated, the minimum sentence of 15 years is reduced to 10 years; the maximum sentence of 45 years is affirmed. The judgment of conviction is affirmed, the sentence is modified; and this cause is remanded

to the circuit court with directions to issue its amended mittimus reflecting such modification.

JUDGMENT OF CONVICTION AFFIRMED; SENTENCE MODIFIED;
CAUSE REMANDED WITH DIRECTIONS.

SIMKINS, J., concurs.

SMITH, P.J., on rehearing: "I am not persuaded that the petition for rehearing justifies either a modification of the opinion or a reduction of sentence. I would deny the petition without modification."

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On February 10, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

FILED

FL3 10195

LOREN J. GROFF, Clerk
(Circuit Court, 1st District)

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,) Appeal from the 18th
) Judicial Circuit,
)
 v.) DuPage County, Illinois.
)
 JOSEPH LEFF,)
)
 Defendant-Appellant.)

Upon a plea of guilty to the offense of forgery, defendant's application for probation was denied and on August 16, 1973 he was sentenced to the Illinois State Penitentiary for a term of 2-6 years.

On the morning of April 22, 1972 one Richard DelGuidice, accompanied by the defendant as a passenger, drove into the drive-in window of the Downers Grove National Bank in Downers Grove, Illinois and presented a check for payment in the sum of \$250.00. The teller recognized the check as having been stolen, detained the vehicle and called the police. Both defendant and DelGuidice were indicted on June 29, 1972 for the offense of forgery. Upon a plea of guilty, co-defendant DelGuidice was granted probation. After defendant's plea of guilty the case was referred to the probation department which, in turn, recommended that probation not be granted and on August 16, 1973 the defendant was sentenced as indicated above.

The argument for leniency presented to the trial court and this court is that the defendant is the father of five children whom

he attempts to support, as well as his wife and his 71 year old mother. In addition, defendant has a long history of illness. He has had two heart attacks and is suffering from ulcers, pulmonary tuberculosis and diabetes. At the time of this offense he was on an "out-patient" treatment basis with the DuPage County Tuberculosis Care and Treatment Board. Also, because of his condition he has been unable to work for the last several years. At the time of this offense he was indebted to a hospital in an amount in excess of \$900. On the other hand, the defendant has had two prior convictions, one for armed robbery in 1953 for which he was given 5 years probation and in 1963 he was sentenced to 1-3 years for the interstate transportation of stolen securities. He was paroled from the latter offense and was on parole at the time he committed the instant offense.

In support of defendant's contention that his sentence should be reduced to probation he has cited People v. Steadman (1972), 3 Ill.App.3d 1047, 280 N.E.2d 17 and People v. Palmer (1971), 2 Ill. App.3d 934, 274 N.E.2d 658. In People v. Steadman, supra, we considered a case involving a transvestite who was committed to the Illinois State Reformatory for Women at Dwight and transferred shortly thereafter to the Illinois State Penitentiary where the transvestite was held in the reception center. Under those circumstances this court reduced the sentence from imprisonment to probation. People v. Palmer, supra, involved a forgery case where the appellate court likewise vacated the sentence and remanded the same to the trial court with directions that the defendant be admitted to probation. Both of those cases were considered by the Supreme Court of Illinois in People ex rel. Ward v. Moran (1973), 54 Ill.2d 552, 301 N.E.2d 300. In that case the appellate court had vacated the defendant's sentence of imprisonment and had granted him probation. The Supreme Court granted the State's attorney leave to file an original action for mandamus seeking to compel the appellate court to vacate that portion of its judgment which granted defendant probation. The Supreme Court in considering this matter noted that the Illinois Unified Code of Corrections (Ill.Rev.Stat. 1973, ch. 38, par. 1001-1-1, et seq.) was

not in effect at the time of the offense and the sentence in that particular case. The Supreme Court stated that they found no decision of that court which afforded precedential value in support of the position of the appellate court in Steadman, supra, and Palmer, supra.

In view of our decision herein, we do not express an opinion as to whether a sentence of imprisonment may be reduced to probation by a court of review under the provisions of the Uniform Code of corrections and Supreme Court Rule 615 (Ill.Rev.Stat. 1973, ch. 110A, sec. 615).

Nor do we express an opinion as to whether or not the trial court did in fact abuse its discretion in refusing to grant probation to this defendant. Under the facts of this case, considering the defendant's physical condition, his history of two heart attacks, tuberculosis, diabetes and ulcers, and considering further that the defendant at the present time has served 15 months of his 2-6 year sentence, under the provisions of Supreme Court Rule 615 we hereby reduce the sentence of the defendant to the time presently served by the defendant in the State Penitentiary and in any other penal institution prior to, during and subsequent to his trial in this case. See People v. Jackson (1974), 21 Ill.App.3d 326, 315 N.E. 2d 204.

Sentence of the defendant, as modified, is affirmed.

AFFIRMED AS MODIFIED.

Seidenfeld, J. and Hallett, J. concur.

25 I.A. ^{3D} 1022

(24540-4M-9-70) 160-0



STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE LELAND SIMKINS, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 27th day
of February A. D. 19 75, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12329

Agenda No. 74-237

McLEAN COUNTY TRUCK CO., a Delaware
Corporation,

Plaintiff-Appellee

v.

MAIN COB CO., INC., a Corporation,

Defendant-Appellant

Appeal from
Circuit Court
McLean County
71-MR-968

Mr. JUSTICE CRAVEN delivered the opinion of the court:

This action was brought by the plaintiff against the defendant for the alleged breach of a contract for the sale of a truck. Following a bench trial, judgment was entered for the plaintiff.

Upon this appeal, the defendant urges that the finding of the trial court that the defendant was a party to the contract was against the manifest weight of the evidence; that the finding of the trial court that the plaintiff was a proper party to bring suit against the defendant was contrary to the manifest weight of the evidence; and that the trial court erred in excluding certain testimony. We affirm the judgment.

The issues in this case center primarily around plaintiff's Exhibit No. 4--a retail installment contract. This retail

installment contract relates to the purchase of a GMC truck. The defendant contends that it did not sign that contract in connection with the purchase of a GMC truck, but rather that it was a contract signed in connection with another transaction. There is much conflict in the testimony with reference to this transaction. The trial court made specific observations with reference to the testimony and the credibility of some of the witnesses and concluded that plaintiff was entitled to judgment. We see no necessity for the repetition of the testimony in this regard and conclude that the finding of the trial court is supported by, and is not contrary to, the manifest weight of the evidence. The finding of the trial court that the plaintiff had standing to sue was correct as a matter of law. The conditional sales contract was assigned by the plaintiff as seller of the truck to a bank. Upon default of the defendant, the plaintiff paid the bank as it was obligated to under the guaranty clause of the contract. This clause in the contract conforms to the legal definition of a guaranty agreement and when the plaintiff paid the bank after the default, it acquired an immediate right to be subrogated to all of the rights of the creditor to the extent necessary to obtain reimbursement. Mobile Const. Co. v. Phoenix Ins. Co., 119 Ill.App.2d 329, 256 N.E.2d 149.

We have examined the defendant's contention with reference to evidentiary rulings. We find no error of law and having concluded that the judgment of the trial court is not against the manifest weight of the evidence and that an opinion in this case would have

no precedential value, accordingly, pursuant to Rule 23 (Ill.Rev. Stat.1973, ch.110A, par.23), the judgment of the circuit court of McLean County should be, and the same is, affirmed.

JUDGMENT AFFIRMED.

SIMKINS, P.J., and TRAPP, J., concur.



3D
25 I.A. 1077

73-302

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
 Honorable WALTER DIXON, Justice
 Honorable THOMAS J. MORAN, Justice
 LOREN J. STROTZ, Clerk
 WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On March 3, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

FILED

APR - 3 1978

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

ROCKFORD HOUSING AUTHORITY,)	
a municipal corporation,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit Court
	)	of the 17th Judicial Circuit,
CLAUDE J. BROWN, d/b/a	)	Winnebago County, Illinois.
B & H AUTO SALES,)	
)	
Defendant-Appellant.)	

MR. PRESIDING JUSTICE RECHENMACHER delivered the opinion of the court:

Defendant appeals from order adjudging him in contempt of court for failure to remove certain personal property from premises and sentencing him to 7 days in the County Jail, without giving him an opportunity to plead and without a trial on the merits.

Appellant filed his brief, excerpts from record, and record and complied with all statutory requirements and rules of court. The appellee, however, filed no appearance or brief in this court. Under such circumstances we may at our discretion either consider the case on its merits or reverse because of appellee's failure to file a brief, in accordance with Supreme Court Rule 341 (Ill. Rev. Stat. 1973, ch. 110A, par. 341). (Daley v. Jack's Tivoli Liquor Lounge, Inc., 118 Ill. App. 2d 264 and People ex rel. Pullman Bank & Trust v. Fitzgerald, 14 Ill. App. 3d 247, 248.) We have examined the record and the issues and have decided that pro forma reversal is the proper action. Therefore, the appellee having abandoned its case and there being no important principle involved, judgment is reversed.

Judgment reversed.

THOMAS J. MORAN and DIXON, JJ., concur.







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